5-minute INTEGRITY FOCUS

December 2017

Discrimination: Race

Q&A

What is it?

We prohibit any discriminatory action based on an individual's status in all aspects of our business. Discriminatory action includes, but is not limited to: firing, refusing to hire, denying training, failing to promote, discriminating in pay or any other conditions or privileges of employment based on an individual's status. The policy also prohibits assisting or encouraging anyone to take discriminatory actions.

What do I need to know?

1. We will not tolerate any form of discrimination or harassment in any aspect of our business. This means we strictly prohibit any discrimination or harassment, by or directed at any associate, job applicant, customer, member, supplier, or person working on behalf of a company.

2. If you experience, observe or become aware of any conduct that may violate the policy, immediately report the violation to any salaried member of management. You may also anonymously contact Ethics at WalmartEthics.com or call 1-800-WMETHIC.

3. We get results the right way, and that includes not tolerating any form of discrimination or harassment.

Need advice? Have a question or concern?

WalmartEthics.com

1-800-WM-ETHIC
1-800-963-8442

U.S. Ethics & Compliance

We do not tolerate retaliation against associates who report ethics concerns. You will not be terminated, demoted or otherwise discriminated against if you report concerns.

Hello,

I'm a department manager. Last month, an associate - Sally - told me that she thought she was being overlooked for a department manager position. She's applied for a promotion three times, but has noticed that it seems only Caucasian applicants are selected. Sally told me that she thinks she's the most qualified applicant, but still doesn't get promoted. What advice should I give to Sally?

-Mark

Mark,

You should recommend Sally speak with her Assistant Store Manager or Store Manager to let them know her concerns. If you supervise Sally, consider giving her constructive feedback on how she might highlight her accomplishments or improve her performance so that she stands out in the applicant pool next time she applies for a promotion. Sally may also contact her Market Human Resources Manager (MHRM) or Ethics.

Sincerely,

Walmart U.S.
Ethics & Compliance

5-minute INTEGRITY FOCUS

January 2018

Sexual Harassment: Inappropriate Behavior

What is it?

We do not tolerate any form of discrimination or harassment. We strictly prohibit any such behavior, by or directed at, any associate, job applicant, customer, member, supplier or person working on behalf of Walmart, Sam's Club and/or its subsidiaries. Our policy applies whether or not the conduct rises to the level of unlawful discrimination or harassment. Harassing conduct is a violation of our culture, beliefs and Statement of Ethics.

Click here to watch the latest episode of Ethics TV.

What do I need to know?

1. If you experience conduct that may violate our policy and/or observe/become aware of any conduct that may violate the policy by being discriminatory, harassing or retaliatory, immediately report the violation to a salaried member of management. You may also email Ethics at ethics@wal-mart.com, call 1-800-WMETHIC (1-800-963-8442) or visit walmartethics.com.
2. If you believe a salaried member of management may be violating the policy, you may report the violation to a different manager or Ethics.
3. We get results the right way, and that includes not tolerating any form of discrimination or harassment.

Don't do it. Don't put up with it.
Report inappropriate touching to a manager or Ethics.

WalmartEthics.com

1-800-WM-ETHIC
1-800-963-8442

U.S. Ethics & Compliance

We do not tolerate retaliation against associates who report ethics concerns. You will not be terminated, demoted or otherwise discriminated against if you report concerns.

Q & A

John is a backroom associate, and I'm uncomfortable around him because he's asked to hug and kiss me many times. The other day, John blocked me from leaving the back hallway, and also wrapped his hand around my arm. John grabbed my arm to make me hug him. I broke away and left the area, but I'm nervous whenever I see John. What should I do?

-Kayla

Kayla,

Our Discrimination and Harassment Prevention Policy prohibits offensive physical contact such as patting, grabbing, pinching, or intentionally brushing against another's body. Conduct like you described is prohibited whether it is welcome or unwelcome, and regardless of the sex, sexual orientation, race, or other status of the individuals involved. Report your concerns to a member of management, Human Resources or Ethics.

Sincerely,

Walmart U.S. Ethics & Compliance

5-minute INTEGRITY FOCUS

April 2018

Sexual Harassment: Report Without Fear

Q & A

What is it?

Some examples of sexual harassment include, but are not limited to:

- Joking or making offensive comments about someone's status, appearance or sexual activity
- Using company e-mail or Internet resources to receive, view, or send offensive jokes, pictures, posters, or other similar things
- Physical touching or assault
- Unwanted sexual flirtations, advances or propositions
- Pressure for sexual activity, offering employment benefits in exchange for sexual favors, or denying employment benefits in response to a refusal to provide sexual favors

What do I need to know?

1. If you see, hear or experience something you think violates our Discrimination & Harassment Prevention Policy, we want you to speak up.

2. **Retaliation** against associates who raise concerns or questions about misconduct **will not be tolerated**. Associates who believe they have experienced retaliation should report the issue to a member of management, an HR representative or Ethics.

How do I report it?

You may report a violation to a salaried member of management or HR, visit walmartethics.com, email Ethics at ethics@wal-mart.com or call 1-800-WMETHIC (1-800-963-8442).

Click here to watch a video about why it's important to report.

Don't put up with it.

Need advice? Have a question or concern?

WalmartEthics.com

1-800-WM-ETHIC
1-800-963-8442

Walmart Sam's Club

My co-worker keeps staring at me and even made a comment about how "fine" I looked today, then winked. It made me very uncomfortable. What should I do?

-Melissa

Melissa,

Don't be afraid to speak up. No one should have to suffer harassment to get or keep a job, or to be eligible for advancement. We take these allegations very seriously and harassment is not tolerated. You will not be terminated, demoted or otherwise discriminated against for reporting sexual harassment.

Sincerely,

Walmart U.S.
Ethics & Compliance

5-minute INTEGRITY FOCUS

July 2018

Conflict Of Interest

Q & A

What is it?

We have a responsibility to all our stakeholders to make decisions strictly on the basis of Walmart's interests, without regard to personal gain. A conflict of interest can arise when our judgment could be influenced, or might appear as being influenced, by the possibility of personal benefit. We should always be on the lookout for situations that may create a conflict of interest and do everything we can to avoid them.

A supplier sent a letter to me stating he knows that Walmart has a no gift policy. So instead of sending a gift, he wants to make a donation to a local charity in my name. What should I do?

-Taylor

What do I need to know?

1. It's your responsibility to tell your manager about any situation you think creates, or could create, a conflict of interest
2. Even if it's not intentional, the appearance of a conflict may be just as damaging to your reputation, and Walmart's reputation, as an actual conflict.
3. If you have a question about a conflict of interest, contact your manager or Ethics.

Taylor,

Per the Statement of Ethics, associates should not accept or approve of suppliers making donations on behalf of Walmart. Walmart wants to protect our fair and objective relationships with suppliers. We should decline these offers and should also not use our position with Walmart to influence where suppliers make contributions.

Sincerely,

Walmart U.S. Ethics & Compliance

Need advice? Have a question or concern?

WalmartEthics.com

1-800-WM-ETHIC
1-800-963-8442

U.S. Ethics & Compliance

Walmart and Sam's Club do not tolerate retaliation against associates who report ethics concerns. You will not be terminated, demoted or otherwise discriminated against if you report concerns.

Tab 7

You have been assigned as the Investigating Manager in an Ethics case. Please see the Investigation Recap below for the allegations and due date. Thank you!

Global Ethics recently updated the Investigation Recap form below. Please review all of the instructions regarding the updates. At the conclusion of the investigation, the form must be fully completed by the Investigator before the case can be closed. Please contact me if you have questions about the new format or completing the form.

Revised Investigative Recap (IR) Form:

1) **Section B.** You are now required to provide the date and location of each interview.
2) **Section D.** You are now required to provide how you verified the facts entered into the Investigative Recap.
3) **Section E.** You are now required to provide the User ID and Coaching number that results from the Ethics investigation after the Ethics Case Manager has reviewed the documents and provided a recommendation.
4) **Section F.** In addition to confirming the closure conversation has taken place with all appropriate parties, you are now required to confirm that you have covered Walmart's policy on anti-retaliation with each associate interviewed. A statement has been provided on the IR for your use.

(PLEASE CONTACT THE REPORTING INDIVIDUAL WITHIN 24 HOURS.)

Steps to the Investigation:

1. **Interview** all parties involved, obtain **witnessing manager notes** and **statements**, and **review documents/video**. Keep these documents in a secure location, like a locked filing cabinet in the managers' office.
2. **Email witness statements to me** and **complete sections A-F of the Investigation Recap below** by hitting "reply" to this email, entering the information, and hitting "send" to return to me. If additional allegations surface during the investigation, please include those in your Investigation Recap or contact me. Unless requested, you do not need to send the witnessing manager notes to me. Do not administer accountability or close out with reporters/subjects until you hear back from Ethics. (This does not apply to matters of associate safety or violent incidents. Please use your discretion in handling those matters in a timely and appropriate manner in order to minimize the impact.)
3. I will determine which allegations are substantiated and make a recommendation of accountability, but the decision on accountability belongs to the business.

Non-Retaliation: Please tell all witnesses interviewed that Walmart does not tolerate retaliation for participating in an investigation. If they experience retaliation, they should report it to Ethics or a salaried manager as soon as possible.

Here are other details from the report:

(D) (6), (D) (7)(C) [redacted] reported a concern that was brought to (D) (6), (D) [redacted] attention about [redacted]

[redacted]

[redacted]

Please contact me with any questions or concerns.

Tier 2 Investigation

Recap

Instructions for Completion: Investigating manager updates section b and c (if applicable) and completes sections d, e and f

A. Initial Report Information	
Case #	WMT-(b) (6), (b) (7)(C)
Facility	3731
Date Reported	[redacted]18
Due Date	[redacted]18
Reporter's Name	(b) (6), (b) (7)(C)
Reporter's Position	[redacted]
Reporter's Contact Information	

B. All Involved Parties										
	Name	Position	Date Interviewed	Location (Facility/Phone)	Involvement					
1.	[redacted]	[redacted]			[redacted]		[redacted]		[redacted]	
[redacted]	[redacted]	[redacted]			[redacted]		[redacted]		[redacted]	
[redacted]	[redacted]	[redacted]				[redacted]		[redacted]		
4.						Subject		Witness		Other Involved Party
5.						Subject		Witness		Other Involved Party

Note: If more than five involved parties, click tab in the last cell to enter additional lines. Include all parties interviewed as part of the investigation.

C. Allegations to be Investigated		
	Allegation Type	Details of Allegation
1.	[redacted]	[redacted]
2.		

3.		
4.		
5.		

Note: If more than five allegations, click tab in the last cell to enter additional lines.

D. Investigation	
	Finding(s) [List facts uncovered from interviews, video, statements, etc., including how those facts were obtained.] [The finding(s) **must** correspond to the allegation number in Section C.]
1.	
2.	
3.	
4.	
5.	

Note: If more than five findings, click tab in the last cell to enter additional lines.
Any additional involved parties discovered during investigation must be added to Section B: All Involved Parties.
Any additional allegation(s) discovered during the investigation must be added to Section C: Allegations to be Investigated.

E. Action Taken

	Name	User ID	Allegation(s)	Current Coaching Level (if applicable)	Action Taken	Coaching Number	Date of Action
1.	[redacted]		[redacted]				
[redacted]	[redacted]		[redacted]				
3.			☐ Substantiated ☐ Unsubstantiated				
4.			☐ Substantiated ☐ Unsubstantiated				
5.			☐ Substantiated ☐ Unsubstantiated				

Note: If more than five actions, copy and paste the last row directly below.
The Ethics Office will make the final determination if an allegation is substantiated and may, at their discretion, request to review documentation.

F. Closure Communication				
Closure Conversations were completed with all appropriate parties, including the reporter?		Yes		No
If no, please explain				
Was Walmart's policy on anti-retaliation covered with all interviewed parties, including the reporter?		Yes		No
If no, please explain				

Manager Conducting Closure Conversations:	
Investigating Manager Name	
Investigating Manager Position	

Walmart anti-retaliation statement:
Retaliation against associates who raise concerns or questions about misconduct will not be tolerated. Associates who believe they have experienced retaliation after raising an ethics concern should report the issue to their manager or Global Ethics as soon as possible.

Tab 8

Job Offer - Hourly

SSN# [redacted] First Name [redacted] MI Last Name [redacted]

Requisition # [redacted] Facility 01-03731 City BERNALILLO State NM

Job Information: 1 Division # [redacted] Department # [redacted] Job Code (b) (6), (b) (7)(C) Job Title

		Position Status	[redacted]
Current Pay Structure	N/A	New pay Structure	4 Level
Current Position Equivalency	0	New Position Equivalency	6
Current Pay Grade	N/A	New Pay Grade	6
Current Pay Rate	[redacted]	PPG Max Amount	[redacted]
		New Base Pay	[redacted]
		Base Pay Rate	[redacted]
		New Additional Pay	[redacted]
		Market Differential Amount	[redacted]
		New Pay Rate	[redacted]
		Position Start Date	[redacted]2017
		Movement Type	DEMOTION

Summarized within are some of the benefits for which you are eligible as an Associate. Items referenced in this document may be subject to change if the governing policy, plan, process and/or practice changes after the employment effective date.

Your schedule and number of hours scheduled will be determined by your availability and the needs of the business.

Note: Your rate of pay is determined by the position equivalency and the job code of the position offered. If in the future, if you move to another position (whether voluntary or involuntary), the new rate of pay will be determined by the position equivalency and job code of the new position.Overnight differentials and market differentials are determined by job code, and therefore will be added or removed from the total rate of pay when applicable. Seasonal differentials are a temporary increase to base pay, and only extend through an eligible time period or to eligible positions as the business defines. The seasonal differential amount will be removed from base pay at the end of the time period, if an associate moves to an ineligible position or location, or as business needs dictate.

The rate of pay provided has been calculated in accordance with the Field Hourly Associate Pay Plan in effect at the time this Job Offer was created. The Field Hourly Associate Pay Plan is subject to revision at any time. Therefore, rate of pay may be modified prior to the effective date of this Job Offer. Refer to the Field Hourly Associate Pay Plan on The WIRE for additional information regarding rate of pay.

By accepting this offer:

- Position equivalency positions and above will be removed from your Current Career Interests and placed in your Future Career Goals.
- Positions lower than a position equivalency will be removed.

Updating Your Career Preferences:

- You may update your Future Career Goals anytime.
- You may update your Current Career Interests when you meet the minimum qualifications for position equivalency positions and above.
- You may update your Current Career Interests with positions less than a position equivalency at anytime and minimum qualifications will not apply.

Contingencies Applicable to this Job Offer:

Neither the offer of this position nor the Job Description relating to this position creates an express or implied contract of employment or any other contractual commitment. Wal-Mart may modify this position, including, but not limited to, the duties, schedule, or pay rate for this position, or modify this job description, at its sole discretion, without notice , at any time consistent with applicable law.

Tab 9

ATTACHMENT/EXHIBIT TO POSITION STATEMENT WITHHELD PURSUANT TO EXEMPTIONS 6 and 7(C)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT

IN THE MATTER OF
WalMart Inc. **Case 28-CA-217718**

Subject to the approval of the Regional Director for the National Labor Relations Board, the Charged Party and the Charging Party **HEREBY AGREE TO SETTLE THE ABOVE MATTER AS FOLLOWS:**

POSTING OF NOTICE — After the Regional Director has approved this Agreement, the Regional Office will send copies of the approved Notice to the Charged Party in English and in additional languages if the Regional Director decides that it is appropriate to do so. A responsible official of the Charged Party will then sign and date those Notices and immediately post them in the location where notices to employees are ordinarily posted at the Charged Party's Bernalillo New Mexico Facility. The Charged Party will keep all Notices posted for 60 consecutive days after the initial posting.

INTRANET POSTING - The Charged Party will also post a copy of the Notice in English and in additional languages if the Regional Director decides that it is appropriate to do so, on its store-specific intranet at its Bernalillo, New Mexico facility, in the location where notices to employees are ordinarily posted, and keep it continuously posted there for 60 consecutive days from the date it was originally posted. The Charged Party will submit a paper copy of the intranet or website posting to the Region's Compliance Officer when it submits the Certification of Posting. The Charged Party will also provide an affidavit to the Region's Compliance Officer attesting that the electronic posting has been accomplished and will provide a screen shot of the intranet posting.

COMPLIANCE WITH NOTICE — The Charged Party will comply with all the terms and provisions of said Notice.

NON-ADMISSION CLAUSE — By entering into this Settlement Agreement, the Charged Party does not admit that it has violated the National Labor Relations Act.

SCOPE OF THE AGREEMENT — This Agreement settles only the allegations in the above-captioned case(s), including all allegations covered by the attached Notice to Employees made part of this agreement, and does not settle any other case(s) or matters. It does not prevent persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters that happened before this Agreement was approved regardless of whether General Counsel knew of those matters or could have easily found them out. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

PARTIES TO THE AGREEMENT — If the Charging Party fails or refuses to become a party to this Agreement and the Regional Director determines that it will promote the policies of the National Labor Relations Act, the Regional Director may approve the settlement agreement and decline to issue or reissue a Complaint in this matter. If that occurs, this Agreement shall be between the Charged Party and the undersigned Regional Director. In that case, the Charging Party may request review of the decision to approve the Agreement. If the General Counsel does not sustain the Regional Director's approval, this Agreement shall be null and void.

AUTHORIZATION TO PROVIDE COMPLIANCE INFORMATION AND NOTICES DIRECTLY TO CHARGED PARTY — Counsel for the Charged Party authorizes the Regional Office to forward the cover letter describing the general expectations and instructions to achieve compliance, a conformed settlement,

(b) (6), (b) (7)(C)

(b) (6), (b) (7)(C)

Atty 9/24/18

original notices and a certification of posting directly to the Charged Party. If such authorization is granted, Counsel will be simultaneously served with a courtesy copy of these documents.

(b) (6), (b) (7)(C) No ABR
Initials

PERFORMANCE — Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of notice that no review has been requested or that the General Counsel has sustained the Regional Director.

NOTIFICATION OF COMPLIANCE — Each party to this Agreement will notify the Regional Director in writing what steps the Charged Party has taken to comply with the Agreement. This notification shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement. If the Charging Party does not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that the Charging Party did not request review or that the General Counsel sustained the Regional Director's approval of this agreement. No further action shall be taken in the above captioned case(s) provided that the Charged Party complies with the terms and conditions of this Settlement Agreement and Notice.

Charged Party **WalMart Inc.**		**Charging Party** **Karen Hodge**	
By: Name and Title	Date	By: Name and Title	Date 9/21/18
Alan Bayless Feldman Print Name and Title below Alan Bayless Feldman Counsel for Walmart Inc.	9/14/18	(b) (6), (b) (7)(C) Print Name and Title below (b) (6), (b) (7)(C)	
Recommended By: Katherine E. Leung Field Attorney	Date 09/24/18	Approved By: Cornele A. Overstreet Regional Director, Region 28	Date 9/26/18

(b) (6), (b) (7)(C)

klg
9/24/18

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT tell you that federal and state agencies cannot help you address concerns about your wages, hours, and working conditions.

WE WILL NOT make any statements that make it appear that we are watching you because you engage in your right to discuss wages, hours and working conditions with other employees.

WE WILL NOT ask you about your protected activity with other employees regarding your wages, hours, and working conditions.

WE WILL NOT prohibit you from discussing our policies with other employees and **WE WILL** rescind the directive promulgated to employees on that subject in February 2018.

WE WILL NOT prohibit you from answering questions from other employees about wages, hours, and working conditions and **WE WILL** rescind the directive promulgated to employees on that subject in February 2018.

BY THIS NOTICE WE HEREBY RESCIND the directive promulgated to employees in February 2018 prohibiting them from discussing our policies with other employees.

BY THIS NOTICE WE HEREBY RESCIND the directive promulgated to employees in February 2018 prohibiting them from answering questions from other employees about wages, hours, and working conditions.

WE WILL NOT threaten you with discipline or unspecified reprisals if you engage in protected activity with other employees regarding your wages, hours, and working conditions.

YOU HAVE THE RIGHT to discuss wages, hours and working conditions with other employees and **WE WILL NOT** do anything to interfere with your exercise of that right.

YOU HAVE THE RIGHT to answer questions from other employees about wages, hours and working conditions and **WE WILL NOT** do anything to interfere with your exercise of that right.

WE WILL NOT subject you to meetings where you are admonished for exercising your right to discuss wages, hours and working conditions with other employees.

dtg
9/24/18

(b) (6), (b) (7)(C)

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

Wal-Mart Inc.
(Employer)

Dated: 09/21/18 **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at https://www.federalrelay.us/tty (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

2600 North Central Avenue
Suite 1400
Phoenix, AZ 85004

Telephone: (602)640-2160
Hours of Operation: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

9/24/18

(b) (6), (b) (7)(C)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
REGION 28
2600 North Central Avenue
Suite 1400
Phoenix, AZ 85004

Agency Website:
www.nlrb.gov
Telephone: (602)640-2160
Fax: (602)640-2178

December 19, 2018

Steven D. Wheeless, Attorney at Law
Alan Bayless Feldman, Attorney at Law
Steptoe & Johnson LLP
201 East Washington Street, Suite 1600
Phoenix, AZ 85004-2382

Re: WalMart Inc.
Case 28-CA-217718

Dear Mr. Wheeless and Mr. Feldman:

The above-captioned case has been closed on compliance. Please note that the closing is conditioned upon continued observance of the informal Settlement Agreement.

Very truly yours,

/s/ Cornele A. Overstreet

Cornele A. Overstreet
Regional Director

cc: (b) (6), (b) (7)(C)

(b) (6), (b) (7)(C)
WalMart Inc.
460 Highway 528
Bernalillo, NM 87004-6633

CAO/BLJ/tmr

FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Mercury Public Affairs (MPA) and
Walmart

b. Tel. No. Mercury: (213) 624-1380
Walmart: (800) 925-6278

c. Cell No.

f. Fax No.

g. e-Mail

h. Number of workers employed

d. Address *(Street, city, state, and ZIP code)*
MPA: 444 South Flower Street, Suite 1530
Los Angeles, CA 90071
Walmart: Office of Community & Govt Relations
702 Southwest 8th Street, Bentonville, Arkansas

e. Employer Representative
MPA: [redacted] (b) (6), (b) (7)(C)
Walmart: (b) (6), (b) (7)(C)
(b) (6), (b) (7)(C)

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
—

j. Identify principal product or service
—

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)*: ____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*
The Employers, by and through their agents, engaged in surveillance of workers involved in concerted activity, and interrogated employee (b) (6), (b) (7)(C) regarding [redacted] concerted activities with workers at other Walmart warehouse contractors.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
Warehouse Workers United

4a. Address *(Street and number, city, state, and ZIP code)*
601 S. Milliken Ave, Ste A
Ontario, CA 91761

4b. Tel. No. 213-453-8454

4c. Cell No. (b) (6), (b) (7)(C)

4d. Fax No.

4e. e-Mail
(b) (6), (b) (7)(C)

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*
Warehouse Workers United

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By [signature] Eli Naduris-Weissman, Attorney
(Signature of representative or person making charge) *(Print/type name and title or office, if any)*

Address 510 South Marengo Ave., Pasadena, CA 91101 06/19/2012 *(date)*

Tel. No. 626-796-7555

Office, if any, Cell No.

Fax No. 626-577-0124

Mail
enaduris-weissman@rsglabor.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

GIBSON DUNN

Silverman
J. Rubin

Gibson, Dunn & Crutcher LLP

333 South Grand Avenue
Los Angeles, CA 90071-3197
Tel 213.229.7000
www.gibsondunn.com

Scott A. Kruse
Direct: +1 213.229.7970
Fax: +1 213.229.6970
SKruse@gibsondunn.com

T 95358-00486

August 15, 2012

VIA EMAIL, FACSIMILE AND UPS NEXT DAY

John A. Rubin, Esq.
Field Attorney
National Labor Relations Board
Region 31
11150 West Olympic Blvd., Suite 700
Los Angeles, CA 90064-1825

Re: Mercury Public Affairs and Walmart
Case 31-CA-083730

Dear Mr. Rubin:

This position statement on behalf of Walmart is in response to the unfair labor practice charge filed by the Warehouse Workers United (WWU) against Mercury Public Affairs (Mercury) and Walmart, alleging unlawful surveillance of workers and interrogation of a worker, apparently arising out of a news conference held on June 6, 2012 and also in response to your letter dated July 22, 2012. Walmart has committed no unfair labor practice, as this position statement will demonstrate. First, we will set forth a chronology of events.[1]

Chronology

In the beginning of June (prior to June 6), the Los Angeles Times asked Walmart to comment on a scheduled news conference for June 6 at the L.A. County Federation of Labor where a new report from the National Employment Law Project would be released entitled: "Chain of Greed: How Walmart's Domestic Outsourcing Produces Everyday Low Wages and Poor Working Conditions for Warehouse Workers." The L.A. Times said it had an advance copy of the report, which Walmart had not seen, and planned to publish a short piece in the paper. The reporter declined to share the report with Walmart.

The L.A. Times ran an article prior to the June 6 news conference about the report which was quite negative toward Walmart. More media inquiries came into Walmart. Walmart decided to have someone attend the press conference to find out what was said about Walmart so as

[1] Walmart reserves the right to supplement this response and does not waive any defenses not raised herein. Walmart stipulates to being engaged in interstate commerce for purposes of NLRB jurisdiction. Please direct any correspondence to me as counsel for Walmart.

to be able to respond appropriately. At the same time, certain unions were also involved in contesting the City of Los Angeles' issuance of a permit to Walmart for a store in Chinatown and have brought litigation appealing the issuance of the permit. Walmart asked Mercury to have someone attend the event to monitor what was said. Mercury was assisting Walmart with public affairs and media relations in Los Angeles and in connection with Walmart's siting of new stores in Los Angeles, including Chinatown.

Attached as Exhibit A is a copy of the Public Affairs/Media Relations Representation Agreement between Walmart and Mercury (the monthly fee amount and contact information of officials have been redacted).[2] The Scope of Work and the specific services to be performed by Mercury are detailed in Article 2. Mercury's role is limited to performing "public relations, community relations and media relations services related to Walmart's involvement in Los Angeles, CA." Mercury is not a labor consultant and does not handle employee relations for Walmart.

When Mercury was asked to have someone attend the press conference, it was intended that such person would distribute a statement from Walmart, but it was not prepared and available in time. Attached as Exhibit B is a June 5, 2012 email string from (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) Walmart, to (b) (6), (b) (7)(C) of Mercury and a reply email from (b) (6), (b) (7)(C) of Mercury to (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C).[3] It states "Just to confirm (b) (6), (b) (7)(C) of Mercury will monitor this press conference on-site tomorrow and distribute our statement, when available . . (b) (6), (b) (7)(C) provide a readout immediately following. We'll touch base with reporters to insure our statement is included in any coverage."

June 6 – (b) (6), (b) (7)(C) of Mercury Public Affairs attended the June 6 press conference event. (b) (6), (b) (7)(C) reported on the event and as to what media were there, but it was not reported to Walmart that (b) (6), (b) had misrepresented (b) (6), (b) (7)(C) as a reporter or interviewed anyone.

June 13 – The Los Angeles County Federation of Labor and Congresswoman Judy Chu hosted an event in Chinatown announcing a June 30 protest/march against Walmart. Walmart asked Mercury to have someone attend and pass out a statement regarding Walmart's plans for the store in Chinatown. (b) (6), (b) (7)(C) attended the June 13 event and was apparently confronted by someone as to why (b) (6), (b) misrepresented (b) (6), (b) (7)(C) as a reporter at the

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[2]/3 Exhibits A and B contain confidential commercial or financial information that falls within Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. Sec. 552(b)(4). We request that the NLRB not provide those documents to any third party and that if the NLRB receives a request for either of those documents, that the NLRB notify Walmart before producing or responding to any such request so that Walmart can assert the confidentiality and protection of such document.

June 6 event. Walmart knew nothing about this misrepresentation by [redacted] who did not tell them about it.

June 14 – Walmart learned via postings that [redacted] misrepresented [redacted] as a reporter at the June 6 event and spoke with a person there as if [redacted] was a reporter. This was the first time Walmart knew anything about [redacted] misrepresentation. Walmart gave a statement to the press that day condemning [redacted] conduct:

> "These actions were unacceptable, misleading and wrong. Our culture of integrity is a constant at Walmart and by not properly identifying [redacted], this individual's behavior was contrary to our values and the way we do business. We insist that all our vendors conduct themselves in a way that is transparent and honest and we will reinforce that expectation to help ensure this type of activity is not repeated."

(A copy of an article in Gawker.com containing that statement, as well as a statement that Mercury gave, is attached as Exhibit C.)

Mercury Public Affairs also gave a statement to the press condemning [redacted] conduct:

> "The action taken by [redacted] was in no way approved, authorized, or directed by Walmart or Mercury. [redacted] is a junior member of our team who made an immature decision. [redacted] showed very poor judgment and Mercury takes full responsibility. We are taking the necessary disciplinary actions. This is an isolated incident that has never happened before and will not happen again." (Mercury also confirmed to the press that [redacted] "is no longer with the company.")

Mercury terminated [redacted] employment.

June 22 – Walmart terminated its contracts with Mercury Public Affairs. Walmart gave another statement post-termination of Mercury (a copy is attached hereto) stating:

> "Our culture of integrity is a constant at Walmart and from day one, we addressed these actions as unacceptable, misleading and wrong. Today, we reached a mutual decision with Mercury Public Affairs to end our business relationship. We take this matter seriously and have taken the appropriate steps to ensure this type of activity is not repeated."

(A copy of a June 25, 2012 article in the Los Angeles Times reflecting that statement, as well as a statement that Mercury gave is attached as Exhibit D.)

Mercury gave another statement as well stating:

> "While the action taken by [redacted] was in no way approved, authorized, or directed by Walmart or Mercury, we take full responsibility for what occurred. [redacted] was a junior member of our team and showed very poor judgment and we dismissed [redacted] from our firm as these actions run contrary to our firm's culture and values."
>
> "We value our clients and our relationship with Walmart and today we reached a mutual decision to end our business relationship."
>
> "We also value our reputation and integrity. In the thirteen years of our firm's existence, we have never had this situation occur. It is not the kind of firm we are. This was an isolated incident and we are taking steps to ensure it never happens again."

Although Walmart has not committed any unfair labor practice, Walmart has taken all appropriate steps to repudiate the wrong that was committed and to make sure it does not occur again.

[redacted] Acted Outside [redacted] Authority and Was Not Walmart's Agent for Purposes of the Alleged Unfair Labor Practices

Walmart asked Mercury to have someone attend the June 6 press conference to hear what would be said about Walmart at the event, get a copy of the report, and identify what media were there. [redacted] was neither asked nor authorized to misrepresent [redacted] as a reporter, nor to interview or question anyone, nor to do any surveillance on any Walmart employees. Thus, [redacted] had no authority to do any of those things and was not Walmart's agent for purposes of any such acts.

In determining whether an individual is an agent of an employer, the National Labor Relations Board ("NLRB") applies the common law principles of agency as set forth in the Restatement of Agency. *Precicitator Services Group, Inc.*, 349 NLRB 797, 801 (2007); *In re D&F Indus., Inc.*, 339 NLRB 618, 619 (2003). The Restatement defines agency as the relationship that arises when one person manifests assent to another person that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act. Restatement (Third) of Agency § 1.01 cmt. c.

The burden of proving an agency relationship exists "is on the party asserting its existence." *In re Cornell Forge Co.*, 339 NLRB 733, 733 (2003). Furthermore, the "agency must be established with regard to the specific conduct that is alleged to be unlawful." *Id.*

(b) (6), (b) (7)(C) is not Walmart's agent with regard to misrepresentation of as a reporter, questioning of the individual at the June 6 event, or alleged "surveillance" of Walmart employees, because the relationship fails to meet the very first and critical requirement for such agency. That is, Walmart in no way manifested assent that act on Walmart's behalf to misrepresent as a reporter, to interview or question anyone, or to engage in surveillance of any Walmart employee. Any such actions on part would have been taken outside the scope of authority and any agency relationship.

Actions taken outside the scope of the agency relationship do not affect the principal's legal position. Restatement (3d) of Agency § 2.01 cmt. c.; see also Vinewood Capital, LLC v. Sheppard Mullin Richter & Hampton, LLP, 735 F.Supp.2d 503, 514 (N.D. Tex 2010) ("An agent has only so much authority as is granted to him by his principal, and a principal is liable for an intentional tort of his agent only if he authorized or ratified the tort.").

Nor can it be argued that (b) (6), (b) (7)(C) misrepresentation of as a reporter was within authority as necessary or incidental to achieving Walmart's manifest authority to attend the press conference. First, as with most press conferences, (b) (6), (b) (7)(C) was admitted to the press conference inside the County Federation building without having to identify (much less to misrepresent as a reporter). Only thereafter did someone apparently offer a clipboard designated for those in the media to sign-in. Second, any action taken as necessary or incidental to achieve a principal's objective must still be "proper" and done "in the usual and ordinary way." *Castillo v. Case Farms of Ohio, Inc.*, 96 F.Supp.2d 578, 593 (W.D. Tex. 1999); Restatement (Third) of Agency § 2.02 cmt.d. Misrepresenting oneself as a reporter does not fall within a "proper and ordinary way" of achieving Walmart's objective. Thus (b) (6), (b) (7)(C) exceeded authority and Walmart is not liable as principal for misrepresentation.

Similarly, (b) (6), (b) (7)(C) was not authorized to interview or interrogate anyone at the June 6 event or to engage in surveillance of any Walmart employee that might be there. Therefore, Walmart cannot be liable for (b) (6), (b) (7)(C) actions.

Separate and apart from Walmart's not being responsible for (b) (6), (b) (7)(C) actions, actions do not constitute unlawful interrogation or surveillance under the NLRA.

No Unlawful Interrogation

Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights to self-organize. 29 U.S.C. § 158(a)(1). Courts and the NLRB have interpreted this section to prohibit "interrogation as to union sympathy and affiliation" because of its "natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained."

N.L.R.B. v. West Coast Casket Co., 205 F.2d 902 (9th Cir. 1953). This prohibition does not apply to [redacted] activities because [redacted] did not ask the individual at the press conference any questions about [redacted] union sympathy, affiliation, or activity.

Even if [redacted] had asked such questions (which [redacted] did not), [redacted] activities would not constitute unlawful interrogation. Courts and the NLRB have emphasized that "[q]uestioning of employees as to union activities is not illegal *per se*. Rather, [a] Section 8(a)(1) violation occurs if, under the totality of the circumstances, the interrogation tends to coerce employees in the exercise of their Section 7 rights." *N.L.R.B. v. Brookwood Furniture*, 701 F.2d 452 (5th Cir. 1983). Generally, the totality of the circumstances is evaluated through the *Bourne* test (named for *Bourne v. N.L.R.B.*, 332 F.2d 47, 48 (2nd Cir. 1964)), which requires the court, judge, or Board to evaluate the following factors:

(1) The background, i.e. is there a history of employer hostility and discrimination?

(2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?

(3) The identity of the questioner, i.e. how high was he/she in the company hierarchy?

(4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of 'unnatural formality'?

(5) Truthfulness of the reply, i.e. did the employee feel he/she had to lie for fear of repercussion?

The Second Circuit in *Bourne* emphasized that interrogation will only be found where it meets the above standards, which it characterized as "severe." *Id.* at 48.

Applying the *Bourne* factors to the instant case, these factors would dictate a finding that [redacted] activities were not coercive. There is no evidence that [redacted] asked targeted questions seeking identities of other union sympathizers/members, or that [redacted] sought any information about union activities, but rather [redacted] questioning was limited to the topic of [redacted] working conditions. [redacted] was not "high up" in the company hierarchy (but rather a [redacted] employee at Mercury, and not even in the Walmart hierarchy). The individual interviewed had no notion that [redacted] was an agent of Walmart (even if one were to assume [redacted] was). The place and method of the questioning were not coercive; the individual had volunteered to be questioned and believed [redacted] responses were going to be used for a newspaper article about working conditions, not as the basis for any employment decisions. In addition, the individual was not a Walmart employee anyway. Finally, there is nothing to indicate that the responding individual was not truthful in [redacted] reply.

Another recent NLRB case also dictates that any questioning by [redacted] was not unlawful interrogation. In *Milum Textile Services Co.,* 357 NLRB No. 169 (Dec. 30, 2011), it was stated:

> When the Respondent's employees presented Milum with the petition, Milum asked them why they wanted a union. Counsel for the General Counsel contends this question constituted unlawful interrogation in violation of Section 8(a)(1) of the Act, but an employer's questioning of employees about their union sentiments does not necessarily violate Section 8(a)(1) of the Act, particularly where the employees are open and active union supporters. The test is whether, under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with statutory rights. To support a finding of illegality, the words themselves, or the context in which they are used, must suggest an element of coercion or interference. *Rossmore House*, 269 NLRB 1176, 1177-1178 (1984), affd. sub nom. *UNITE HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985) (questioning of open and active union supporter about prounion mailgram he sent to employer was not coercive). Here, the employees, having engaged in a work stoppage for the purpose of presenting a signed union authorization petition to their employer, could scarcely have more openly or actively demonstrated their union support. Milum's subsequent question was posed without animosity or intimidating comment and did not, therefore, tend to restrain, coerce, or interfere with the employees' statutory rights. I shall, therefore, dismiss this allegation of the complaint.

Similarly, in the present case, the person whom [redacted] interviewed (who was not a Walmart employee) was at the Warehouse Workers Union (WWU) press conference for the purpose of being interviewed by the press about [redacted] pro-WWU support and to express [redacted] support publicly. [redacted] was an open and active union supporter. Thus, even if [redacted] had asked [redacted] about [redacted] union support (which [redacted] did not do), such questions of an open union supporter (although not even a Walmart employee) would not have been unlawful coercive conduct, as was held in the *Milum Textile* case and the other NLRB and Ninth Circuit Court of Appeals case cited therein.

In sum, even if [redacted] questioning were analyzed as potential interrogation in violation of Section 8(a)(1), it was not coercive under the totality of the circumstances, and therefore it was not an unfair labor practice.

No Unlawful Surveillance

An entity's surveillance of individuals only violates Section 8 of the NLRA if the surveillance is of individuals with whom the entity has an employment relationship or individuals seeking an employment relationship with the entity. Thus, in *Wackenhut*

Corporation and Services Employees International Union, 348 N.L.R.B. 1290 (N.L.R.B. 2006), the NLRB made clear that an entity's conduct cannot constitute unlawful surveillance if the individuals subject to the surveillance were not "employees of, or applicants for jobs with," the entity. Id. at 1291. There must be an employment relationship, or the individuals must have had or be seeking such a relationship, for liability under the NLRA to attach to an entity's conduct. Ibid.; see also *Maclean Power Systems*, 2007 N.L.R.B. LEXIS 392, *2 (N.L.R.B. Sept. 27, 2007) ("Neither of these handbillers was employed by Respondent and neither had applied to become an employee of Respondent. Strictly speaking, therefore, management's observation of these two individuals does not constitute unlawful surveillance of employees.").

Since Walmart did not know and does not know of any Walmart employee being at the June 6 press conference, no unlawful surveillance under the NLRA by (b) (6), (b) (7)(C) is even possible. (Nor did (b) (6), (b) (7)(C) report to Walmart on any Walmart employees at the event, since that was not something (b) (6), (b) was asked to do.)

In addition, the press conference was called for the very purpose of publicity. Anyone could attend the press conference. This is hardly an event where surveillance is applicable. Even if there had been Walmart employees at the press conference, Walmart's simply having someone at the press conference which was open to the public cannot be unlawful surveillance. "[M]anagement officials may observe public union activity, particularly where such activity occurs on company premises, without violating Section 8(a)(1) of the Act, unless officials do something out of the ordinary." *Metal Industries, Inc.*, 251 NLRB. 1523, 1523 (1980)"; see also *Wal-Mart Stores, Inc.* & UFCW, 352 NLRB 815 (2007)) and *Ark Las Vegas Restaurant Corporation*, 333 NLRB 1284, 1303 (NLRB 2001) (in which lawful surveillance and interrogation charges were rejected where: "[the employee] had gone to the [union] rally in full view of anyone who wanted to look. Indeed, it was such a public matter that 'surveillance' seems to be an antilogy in the circumstances. The Union was pleading for the world to look and listen. That [the supervisor] observed what was happening can be no surprise.").

The Continental Group, Inc., 353 N.L.R.B. 348 (N.L.R.B. 2008) (reversed in part on other grounds), is particularly instructive to the present case. In that matter, the Administrative Law Judge found, and the NLRB affirmed the finding, that Continental officials had not engaged in unlawful surveillance by attending a press conference sponsored by a union. *Id.* at 348 fn. 7 and 357. Only one non-supervisory employee of Continental, Howard Williams, attended the press conference, and he did not know at the time that any Company officials were in attendance. *Id.* at 356-57. While there was some evidence indicating that the Company officials may have photographed attendees and written down license plate numbers, Williams did not claim that ***he*** was photographed, and he did not drive to the event

(and thus any license plate numbers transcribed could not have been his). *Id.* at 357. On this basis, the ALJ and the Board found that the Continental official's actions "did not impinge" on the rights of the one employee in attendance. *Ibid.* There was not unlawful surveillance and the employer's mere presence at the union press conference was not unlawful.

(b) (6), (b) (7)(C) presence at the press conference was not unlawful surveillance of employees for several independent reasons: (1) (b) (6), (b) was not asked or authorized to surveil any Walmart employee; (2) neither Walmart nor (b) (6), (b) were or are aware of any Walmart employee being at the press conference; (3) (b) (6), (b) made no report to Walmart that any Walmart employee was there (which is, of course, consistent with the fact that (b) (6), (b) was not asked about that) (see *The Continental Group*, id., above); (4) the persons at the press conference (including the one (b) (6), (b) (7)(C) talked with) were seeking to be interviewed by the press and to be quoted in the press about their position on Walmart. (b) (6), (b) (7) presence at the press conference to find out what was being said to the press about Walmart so it could respond appropriately, is not unlawful surveillance.

Repudiation

Even if (b) (6), (b) (7)(C) had committed any unfair labor practice (b) (6), (b) did not) and even if Walmart were somehow responsible for (b) (6), (b) conduct (it is not), Walmart has repudiated any conduct by (b) (6), (b) (7)(C) the day it learned of (b) (6), (b) misrepresenting (b) (6), (b) (7)(C) as a reporter and has since terminated its relationship with Mercury Public Affairs.

The Board set forth the standards for repudiation of an unfair labor practice under the NLRA in *Passavant Memorial Hospital*, 237 NLRB 138 (1978), requiring that the repudiation be: (1) timely, (2) unambiguous, (3) specific to the coercive conduct, (4) free from other proscribed illegal conduct, (5) adequately publicized, (6) no proscribed conduct on the employer's part after the publication, and (7) give assurances that the employer will not interfere with employee rights in the future.

Walmart's repudiation of (b) (6), (b) (7)(C) conduct was (1) timely - it was given the same day that Walmart learned of (b) (6), (b) conduct; (2) unambiguous - Walmart stated to the press" "These actions were unacceptable, misleading and wrong . . . by not identifying (b) (6), (b) (7)(C) the individual's behavior was contrary to the way we do business"; (3) specific - see statement to press quoted above; (4) Walmart's repudiation was free from any other proscribed illegal conduct; (5) adequate publication -- Walmart repudiated (b) (6), (b) conduct by its statements to the Los Angeles Times, Gawker.com, and other media the day Walmart learned of (b) (6), (b) conduct, and Walmart's statements were quoted in those and other publications; in addition, the individual (b) (6), (b) (7)(C) questioned was quoted in the same newspaper articles as was Walmart's statement, and, thus, (b) (6), (b) also saw Walmart's repudiation of (b) (6), (b) (7)(C) conduct; (6) there has been no proscribed conduct by Walmart after publication of the repudiation; and

(7) Walmart's repudiation gave assurances of no such conduct in the future: Walmart's first statement to the press on June 14 said "We insist that all our vendors conduct themselves in a way that is transparent and honest and we will reinforce that expectation to help ensure that this type of activity is not repeated," and Walmart's second statement on June 22 also stated "We take this matter seriously and have taken the appropriate steps to ensure this type of activity is not repeated" (Walmart terminated its relationship with Mercury Public Affairs on June 22). Thus, Walmart has repudiated (b) (6), (b) (7)(C) conduct.

Conclusion

In sum, (b) (6), (b) (7)(C) acted outside (b) (6), (b) authority and the scope of the relationship with Mercury Public Affairs and was not Walmart's agent for purposes of any alleged unfair labor practices; no unlawful coercive interrogation took place; no unlawful surveillance of any Walmart employee occurred; and, in any event, Walmart has repudiated any wrongful conduct by (b) (6), (b) (7)(C) and taken appropriate steps to make sure none occurs in the future.

We believe that this position statement provides the Board with the necessary information to dismiss the unfair labor practice charge. We would welcome the opportunity to discuss this matter with you and look forward to the dismissal of the charges.

Yours truly,

Scott A. Kruse

SAK/(b) (6), (b) (7)

cc: Mori Pam Rubin, Regional Director
Joanna Silverman, Supervisory Field Attorney

101349477.1

PUBLIC AFFAIRS/MEDIA RELATIONS REPRESENTATION AGREEMENT

This Public Affairs/Media Relations Representation Agreement, which together with the Standard Terms (as defined below) shall collectively constitute this "*Agreement*," is made effective the [redacted], between Wal-Mart Stores, Inc. ("*Walmart*") and **Mercury Public Affairs. ("*Consultant*").**

ARTICLE 1: TERM AND CONTACT PERSONS

1.1. TERM. This Agreement will become effective on the date set forth above and will terminate on [redacted], unless sooner terminated as provided in this Agreement (the "*Term*"). This Agreement may be extended on a month-to-month basis upon written approval of both parties.

1.2. CONTACT PERSONS. (a) Wal-Mart designates [redacted] ("*Wal-Mart Contact*") as Wal-Mart's primary contact. Consultant shall direct all reports, notices, inquiries, and other communications to Wal-Mart Contact at:

Mailing Address:
E-mail:
Phone:

(b) Direct invoices: All invoices and direct invoice questions should be emailed to:
E-Mail: re.invoices@wal-mart.com

(c.) Consultant designates [redacted] **("*Consultant Contact*")** as Consultant's primary contact. Wal-Mart shall direct all reports, notices, inquiries, and other communications to Consultant Contact at:

MailingAddress:
E-mail:
Phone:
HOST Vendor Number:
SAP Vendor Number:

ARTICLE 2: SCOPE OF WORK

2.1. SPECIFIC SERVICES TO BE PERFORMED BY CONSULTANT. Consultant has been retained by Walmart [redacted] The Consultant's role during the Term will be to [redacted] Services will include, but will not be limited to:

[redacted]

ARTICLE 3: COMPENSATION

[redacted] almart agrees to pay Consultant in accordance with the following terms and conditions:
onsultant
/almart

3.1. FEE. (b) (4) r
(b) (4)

3.2. EXPENSES. (b) (4)
(b) (4)

ARTICLE 4: INCORPORATION OF STANDARD TERMS AND CONDITIONS

4.1. ADDITIONAL TERMS AND CONDITIONS INCORPORATED HEREIN. This Agreement hereby specifically and fully incorporates by reference the Standard Terms and Conditions posted as of the date of this Agreement at _____ (the "*Online Standard Terms*"). By signing below, Consultant acknowledges that Consultant has read and agrees to be bound by the Online Standard Terms.

4.2. CHANGES TO STANDARD TERMS AND CONDITIONS. Wal-Mart may from time to time amend the Standard Terms and Conditions by including such changes in the Standard Terms and Conditions document and posting it to (b) (6), (b) (7)(C) Such changes shall not apply to this Agreement; provided that upon any renewal, extension or other amendment of this Agreement by the parties hereto, the Standard Terms and Conditions posted as of the date of such renewal, extension or amendment shall apply to the renewed, extended or amended agreement.

4.3. ENTIRE CONTRACT. This Agreement, which includes the Online Standard Terms incorporated by reference above, supersedes any and all other agreements, either oral or written, between the parties hereto with respect to rendering of services by Consultant for Walmart, and contains all of the agreements between the parties with respect to the subject matter hereof.

THE PARTIES HEREBY enter into this Agreement (including the Online Standard Terms) as of the date first above written, and the signatories hereto represent that by signing below, they are authorized to execute this Agreement and to obligate the respective parties.

CONSULTANT
(b) (6), (b) (7)(C)

Name: (b) (6), (b) (7)(C)

Date: 1/5/2012

(b) (6), (b) (7)(C)

(b) (6), (b) (7)(C)
Consultant
Walmart

STANDARD TERMS AND CONDITIONS
APPLICABLE TO
CORPORATE AFFAIRS REPRESENTATION AGREEMENTS

The following terms and conditions are incorporated into and made a part of the [State Government Relations/Public Affairs/Community Affairs] Representation Agreement that you are entering, pursuant to Section 4.1 of the signed portion of the Agreement. All capitalized terms not defined below shall have the meanings set forth in the signed portion of the Agreement.

ARTICLE 5: PERFORMANCE OF SERVICES

Section 5.1. METHOD OF PERFORMANCE; REPORTING. Consultant will determine the method, details and means of performing services under this Agreement. Consultant shall report the extent and nature of the activities being performed under the terms of this Agreement on a quarterly basis or as otherwise requested by Wal-Mart.

Section 5.2. ADDITIONAL STAFF. Consultant may, at Consultant's sole expense unless previously agreed to by Wal-Mart, employ such additional staff and subcontractors as Consultant deems necessary to perform the services required of Consultant under this Agreement. Any staff and subcontractors employed by Consultant must agree to be, and shall be, bound by the provisions of this Agreement, including those regarding work product (Article 7), compliance with laws (Section 9.1), confidentiality (Section 9.3), conflicts of interest (Section 9.4) and legal clearance (Section 9.5). Consultant will include appropriate language in its subcontractor agreements to protect Wal-Mart in this regard. Consultant shall be responsible for the actions of all such staff and subcontractors.

Section 5.3. AMOUNT OF SERVICE. Consultant agrees to devote the time necessary to complete performance of the services required of Consultant under this Agreement. Consultant makes no representations or warranties as to the outcome of its services. Consultant is not precluded hereunder from representing, performing services for, or being employed by, other persons or companies, provided that such representation, services or employment do not create a conflict of interest with Wal-Mart (as further set forth in Section 9.4 below).

Section 5.4. INDEPENDENT CONTRACTOR. Consultant shall perform all services under this Agreement as an independent contractor and shall not be treated as an employee of Wal-Mart for federal, state or local tax purposes or any other purposes. Nothing contained in this Agreement shall be deemed to create a partnership or joint venture. Neither party to this Agreement may enter into contracts on the other party's behalf, or otherwise legally bind the other party, except as expressly provided in this Agreement.

Section 5.5. NO ASSIGNMENT. Neither this Agreement nor any duties or obligations under this Agreement may be assigned, delegated or subcontracted by Consultant without the prior written consent of Wal-Mart, except as expressly provided herein. If Wal-Mart consents to the subcontracting of all or part of Consultant's duties under this Agreement to a third party,

Consultant's subcontractor must agree in writing to be bound by all terms of this Agreement prior to performing services, and Consultant shall be responsible for the actions of such subcontractor.

Section 5.6 POLLING SERVICES. Any survey completed by or contracted for consultant will not be used as a means for gathering individual information concerning current or potential Wal-Mart employees. All surveys will be conducted on a voluntary and anonymous basis, with adequate assurances of the same before the solicitation of any survey responses. Consultant and its contractors shall take any and all steps necessary to protect the anonymity of survey respondents in the collection, analysis, transmittal, and storage of information obtained through the survey. Consultant and its contractors also shall provide Wal-Mart with survey results on an aggregate, rather than an individual basis. Under no circumstances shall Consultant or its contractors transmit or make available to Wal-Mart information concerning any individual survey respondents, including any information that could lead to the identification of that respondent and his or her survey responses.

ARTICLE 6: INVOICING AND TIME FOR PAYMENT

6.1. INVOICING AND TIME FOR PAYMENT. Consultant shall be responsible for providing Wal-Mart with a monthly invoice by the 10th day of the month for the services rendered in the prior month. The invoice must summarize all work performed during the month. Invoices submitted without a summary of work are subject to not being processed for payment. Wal-Mart agrees to pay invoices for Monthly Fee and approved expenses within thirty (30) days after receipt from Consultant. In the event of a disputed charge, Wal-Mart shall notify Consultant in writing of the disputed amount within thirty (30) days after receipt of the invoice, specifically identifying the reason for the dispute, and shall pay all undisputed amounts owed while the dispute is being resolved. Consultant agrees to submit invoices to the Wal-Mart Public Affairs offices in Bentonville, Arkansas, in accordance with the procedures and practices as established by Wal-Mart in separate writings.

6.2. NO COMMISSIONS. Consultant shall not be entitled to commissions for any creative services, placement of media or related services in connection with this Agreement.

ARTICLE 7: WORK PRODUCT

Section 7.1. WORK PRODUCT OWNERSHIP. Subject to any third-party rights in licensed elements approved by Wal-Mart, all written materials, documentation, electronic files, videos, media, designs, inventions and/or other work product, including any adaptations thereof (collectively, "Work Product"), developed by Consultant (or Consultant's staff or subcontractors) on Wal-Mart's behalf, or developed using Wal-Mart's Confidential Information, is and shall be the confidential and exclusive property of Wal-Mart. Consultant hereby assigns to Wal-Mart any right it may have in the Work Product, and agrees that it shall have no proprietary interest in any such Work Product.

Section 7.2. DELIVERY OF WORK PRODUCT AND RETURN OF INFORMATION. Upon Wal-Mart's request, Consultant shall provide Wal-Mart with all Work Product referenced in Section 7.1 above, and return all Confidential Information used to develop such Work Product. All of the Work Product and Confidential Information shall be provided to Wal-Mart including, but not limited to, any and all electronic copies. Consultant shall have 15 days from receipt of

such request to return and/or provide all such information to Wal-Mart and to notify Wal-Mart in writing that Consultant has fulfilled its obligations under this Section 7.2.

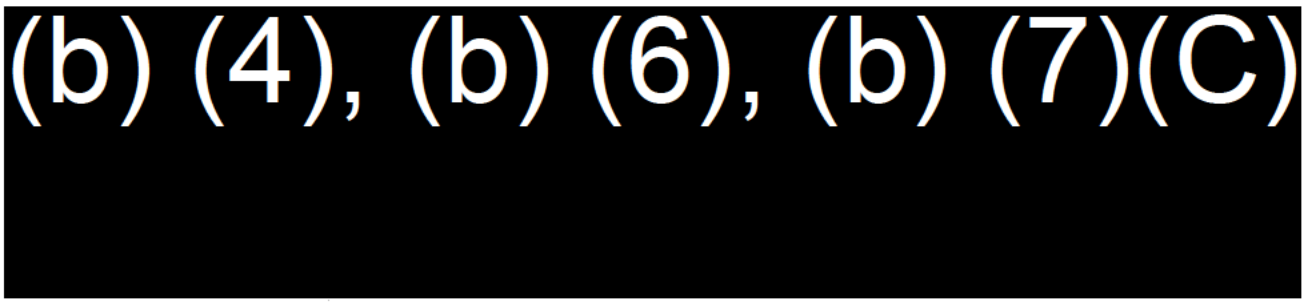
ARTICLE 8: MODIFICATION OF SCOPE OF WORK

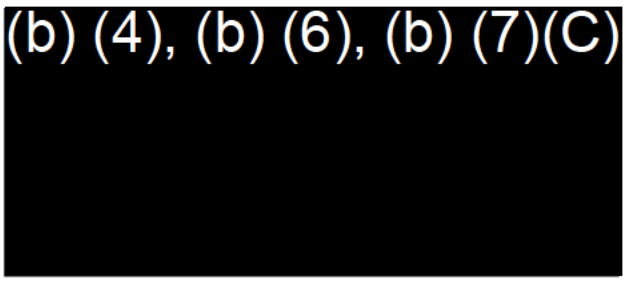
Section 8.1. MATERIAL CHANGE IN SCOPE OF WORK. In the event that Consultant's Scope of Work under Article 2 of this Agreement covers several distinct services or more than one *Project*, and Wal-Mart determines that it no longer desires or requires Consultant's services with respect to a certain service or *Project*, then upon thirty (30) days advance written notice to Consultant, Wal-Mart may cancel such portion of Consultant's services that it no longer desires or requires. After such notice period, the Monthly Fee payable under Section 3.1 for all services provided by Consultant will be proportionally reduced. (For example, cancelling 1 out of 3 Projects would result in Monthly Fee being reduced by one-third.)

Section 8.2. PAYMENT FOR CANCELLED WORK IN PROCESS. In the event Wal-Mart modifies or cancels any plans or work in process, Wal-Mart agrees to pay Consultant according to the terms of this Agreement for any work completed, including but not limited to reimbursing Consultant for all reasonable and pre-approved expenses incurred thereto. Wal-Mart will also assume Consultant's financial liability under any contracts or commitments Consultant is unable to cancel, including reasonable cancellation penalties incurred; provided however that Wal-Mart's liability shall be strictly limited to direct contract fees or commitment costs as evidenced by proper support documents. In the event of a dispute regarding compensation owing upon an Article 10 termination of this Agreement, compensation will be allocated based on the duration of the Term through the date of such termination.

ARTICLE 9: ADDITIONAL CONSULTANT OBLIGATIONS

Section 9.1. COMPLIANCE WITH LAWS. Consultant will comply in full with all applicable federal, state, and local laws and regulations. This includes but is not limited to laws concerning privacy and communications including any all rules and regulations of the FCC and FTC. Consultant will comply with rules of governmental agencies and bodies, including those which govern gifts, donations, contributions, and expenditures that benefit, directly or indirectly, public officials. Consultant agrees to notify Wal-Mart immediately: (a) of any conduct on Consultant's part that may be in violation of any applicable federal, state and local laws and (b) if Consultant receives notice of, or otherwise becomes aware of, any actual or threatened investigation, action, litigation, or disciplinary or other proceeding of which Consultant is or may be a subject in connection with Consultant's services hereunder and to the extent permitted by applicable law, shall provide Wal-Mart with all written notices and communications received by Consultant relating to any such investigation, action, litigation or disciplinary proceeding.





Section 9.3. CONFIDENTIALITY. (a) Consultant acknowledges that during the term of this Agreement, in the performance of consulting services under this Agreement, Consultant will come into possession of "Confidential Information" as defined in Section 9.3(b) below. Consultant hereby covenants and agrees it shall use the Confidential Information solely in connection the performance of its obligations under this Agreement, and that during the Term of this Agreement and for a period of five (5) years following the expiration or termination of this Agreement, Consultant shall not disclose any Confidential Information of Wal-Mart to any third party except where such Confidential Information is required to be disclosed in compliance with a court order or applicable law, and in such case, Consultant shall, to the extent it is legally permitted to do so, inform Wal-Mart of such court order or legal requirement immediately, shall disclose only such Confidential Information that is required, and shall help Wal-Mart seek protective means to protect the confidentiality of the Confidential Information to be released, at Wal-Mart's expense. On or prior to the termination of this Agreement, Consultant shall return to Wal-Mart all documentation, programs, software, equipment, statistics, and other written business materials and data concerning Wal-Mart or any competitor of Wal-Mart in Consultant's possession as a result of Consultant's performance of this Agreement. In the course of performing services, Consultant may disclose certain Confidential Information which Wal-Mart has approved in writing for disclosure.

(b) "Confidential Information" means information designated as such by Wal-Mart or that should reasonably be known to be proprietary and confidential, pertaining to the business of Wal-Mart, and including, without limitation, trade secrets obtained by Consultant during the course of, or as a result of, his or her services, including, without limitation, information regarding processes, suppliers (including the terms, conditions or other business arrangements with suppliers), advertising and marketing plans and strategies, profit margins, seasonal plans, goals, objectives, projections, compilations and analyses regarding Wal-Mart's business, salary, staffing, compensation, promotion, diversity objectives and other employment-related data or personally identifiable consumer data, and any know-how, techniques, practices, or non-public technical information regarding the business of Wal-Mart. Confidential Information shall not include information that (a) is or falls into the public domain by no fault of Consultant; (b) is disclosed to Consultant by a third party which is not under an obligation of confidentiality to Wal-Mart; or (c) is independently developed by Consultant without reference to Confidential Information.

Section 9.4. NO CONFLICT OF INTEREST. To protect the Confidential Information and the business interests of Wal-Mart, and in further consideration of the compensation paid by Wal-Mart to Consultant hereunder, and because competition in the retail industry is significant, Consultant agrees not to provide substantially similar services, or disclose any Confidential Information obtained through Consultant's performance of this Agreement, to (a) any directly

competitive retailers or (b) organizations with agendas that are materially adverse to the interests of Wal-Mart, during the time Consultant is providing services pursuant to this Agreement and for six months thereafter, without Wal-Mart's prior written consent. For clarity, nothing in this paragraph shall be interpreted as reducing Consultant's obligations to protect Confidential Information under Section 9.3 above.

Section 9.5. LEGAL CLEARANCE. Consultant shall obtain written clearance from Wal-Mart's legal counsel of any materials of a legally substantive or confidential nature prior to allowing dissemination of such materials.

Section 9.6. RECORD RETENTION. For a period of at least two (2) years after termination of this Agreement, Consultant shall maintain such records as are necessary to substantiate that all invoices and other charges for payment hereunder were valid and properly chargeable to Wal-Mart. Wal-Mart, at its expense, upon no less than thirty (30) days' prior written notice to Consultant, will be given the opportunity to audit such records at Consultant's offices during regular business hours in order to verify the accuracy of such invoices and other charges. Notwithstanding anything to the contrary herein, in no event will Wal-Mart have access to documents revealing individual salaries of employees, profitability, overheads, non-billable expenses, or other proprietary information of Consultant.

ARTICLE 10: TERMINATION OF AGREEMENT

(b) (4)

[redacted]

ARTICLE 11: GENERAL PROVISIONS

Section 11.1. WAL-MART REPRESENTATIONS AND WARRANTIES. Wal-Mart represents and warrants to Consultant that it shall be responsible for: (b) (4)

(b) (4)

[redacted]

Section 11.2. FORCE MAJEURE. Neither party shall be liable for any delay or failure to carry or make continuously available its obligations under this Agreement if such delay or failure is due to any cause beyond such party's control including without limitation restrictions of law or regulations, labor disputes, acts of God, acts of terrorism or war, telecommunications, network or power failures or interruptions.

Section 11.3. LIMITATION OF LIABILITY. Except for the indemnity obligations hereunder, in no event whatsoever shall either party be liable to the other hereunder for any incidental, indirect, special, consequential or punitive damages or lost profits under any tort, contract, strict liability or other legal or equitable theory arising out of or pertaining to the subject matter of this Agreement, even if said party has been advised of the possibility of or could have foreseen such damages.

Section 11.4. NOTICES. Any notices to be given under this Agreement by either party to the other party shall be addressed to the respective contact person set forth in Section 1.2 and may be effected either by personal delivery in writing; by guaranteed overnight delivery; by mail, registered or certified, postage prepaid with return receipt requested; or by an electronic transmission, which creates a record that may be retained, retrieved, and reviewed by either party. Either party may change the address upon which written notice is mailed or electronic transmission is forwarded in accordance with this Section 11.4. Notices delivered personally will be deemed communicated as of actual receipt; mailed notices and electronic transmissions will be deemed communicated as of the date received. Any required written notices to Wal-Mart must include a copy to: Wal-Mart Stores, Inc.--Legal, 702 S.W. 8th Street, Bentonville, AR 72716.

Section 11.5. INDEMNIFICATION. Each party agrees to and shall defend, indemnify, and hold harmless the other party; that indemnified party's parent company and all related or affiliated companies; and all affiliates, officers, directors, associates, employees, servants and agents of each, from and against all third party claims, damages, expenses, including reasonable attorneys' fees and costs, losses, causes of action or suits, which arise out of or relate to the negligent act or omission, or willful misconduct of the indemnifying party, its employees, agents, servants, subcontractors, or assigns.

Section 11.6 INSURANCE. Unless waived by Wal-Mart in writing, during the term of this Agreement, Consultant shall, at its own cost and expense, obtain and maintain in full force and effect during the term of this Agreement the following insurance:

(b) (4)

Section 11.7. CHOICE OF LAW; VENUE; INJUNCTIVE RELIEF. This Agreement is governed by the laws of Arkansas, without regard to conflict of law principles. Any litigation hereunder shall be brought in the U.S. District Court for the Western District of Arkansas or a state court of competent jurisdiction in Benton County, Arkansas. The parties to this Agreement hereby consent to the venue and jurisdiction of those courts.

The parties further recognize and affirm that in the event of a breach or a threatened breach of this Agreement's provisions regarding Work Product and Confidential Information, money damages may be inadequate and Wal-Mart may not have an adequate remedy at law. Accordingly, the parties agree that in the event of a breach or a threatened breach of provisions of Article 7 (Work Product) or Section 9.3 (Confidential Information), Wal-Mart may, in addition to pursuing any other rights and remedies existing in its favor, apply to any court of law or equity of competent jurisdiction for specific performance and/or injunctive or other relief in order to enforce or prevent any violations of the foregoing provisions.

Section 11.8. ATTORNEYS' FEES. In any litigation, arbitration or other proceeding by which one party, including a third-party beneficiary, seeks to enforce its rights under this Agreement, the party receiving injunctive relief or the greater sum of damages will be awarded actual reasonable attorneys' fees, together with any costs and expenses, incurred in connection with any such dispute or proceeding or to enforce the final judgment.

Section 11.9. SEVERABILITY. If any term, covenant, or condition of this Agreement (including both the signed portion and these Standard Terms and Conditions) or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Agreement, or the application of such term, covenant, or condition to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each and every remaining term, covenant, or condition of this Agreement shall be valid and enforced to the fullest extent permitted by law.

Note: Section 5.2 amended 12/06/2010. "Subcontractor" added and requirements for subcontractor agreements.
Section 11.6 added 12/06/2010. Insurance obligations of consultant.

[END OF STANDARD TERM AND CONDITIONS]

From: (b) (6), (b) (7)(C)
Sent: Tuesday, June 05, 2012 2:31 PM
To: Rache(b) (6), (b) (7)(C)
Subject: Re: L.A. County Federation of Labor Press Conf 6/6

Great thanks!

From: (b) (6), (b) (7)(C)
Date: Tue, 5 Jun 2012 17:29:51 -0400
To: (b) (6), (b) (7)(C) Microsoft Office User
Subject: FW: L.A. County Federation of Labor Press Conf 6/6

FYI – and thanks.

From: (b) (6), (b) (7)(C)
Sent: Tuesday, June 05, 2012 2:30 PM
To: (b) (6), (b) (7)(C)
Cc: (b) (6), (b) (7)(C)
Subject: L.A. County Federation of Labor Press Conf 6/6

H(b) (6), (b) –
Just to confirm (b) (6), (b) (7)(C) of Mercury will monitor this press conference on-site tomorrow and distribute our statement, when available. (Please include me when it's available and I'll ensure our team has it.)
(b) (6), (b) (7) provide a readout immediately following. We'll touch base with reporters to ensure our final statement is included in any coverage. Please let me know how else I can help.
Thanks,
(b) (6), (b) (7)(C)

Walmart Stores, Inc.
P.O. Box 556493
Los Angeles, CA 90055
Save Money. Live Better.

From: Elizabeth Brennan [mailto:Elizabeth.Brennan@changetowin.org]
Sent: Monday, June 04, 2012 12:59 PM
To: (b) (6), (b) (7)(C)
Subject: Wednesday: New Report Detailing Walmart's Damaging Effects on Latino Workforce
For Immediate Release: Monday, June 4, 2012
Contact: Elizabeth Brennan at 213-999-2164

Latina Leaders to Hold Press Conference on New Report Detailing Walmart's Negative Effects on the Local Economy

NELP Report Reveals Working Conditions in the Warehousing and Logistics Sector Have a Profound Adverse Effect on Latinos in Southern California

LOS ANGELES - Walmart and other big box retailers have significantly lowered the quality of jobs and disproportionately impacted working Latinos in Southern California on a scale far greater than previously understood, a new report to be released Wednesday by the New York-based National

Employment Law Project reveals.

Local leaders along with warehouse workers will hold a press conference at the Los Angeles County Federation of Labor at 12 noon, Wednesday, June 6 to release "Chain of Greed" detailing Walmart's outsized influence in Southern California that keeps labor costs artificially low, masks responsibility for poor working conditions and drives down workplace safety standards. The report's release comes on the heels of major criticism of Walmart for an alleged bribery scandal in Mexico, growing concerns about Walmart's plans to open a store in LA's Chinatown and demands at Walmart's shareholder meeting in Bentonville last week to increase transparency.

WHAT: Press Conference to release new national report, "Chain of Greed," by the National Employment Law Project
WHEN: 12 noon
Wednesday, June 6, 2012
WHERE: L.A. County Federation of Labor
2130 West 9th Street
Los Angeles, CA 90006
WHO: Maria Elena Durazo, secretary-treasurer of the Los Angeles County Federation of Labor
Guadalupe Palma, a campaign director for Warehouse Workers United
Angelica Salas, executive director of the Coalition for Humane Immigrant Rights of Los Angeles
Warehouse Workers who work moving Walmart Goods

###

Elizabeth Brennan
Communications Director
Warehouse Workers United
(213) 999-2164

ATTACHMENT/EXHIBIT TO POSITION STATEMENT WITHHELD PURSUANT TO EXEMPTIONS 6 and 7(C)

Gee
Silverman
J. Rubin

Proskauer Proskauer Rose LLP 2049 Century Park East, 32nd Floor Los Angeles, CA 90067-3206

Mark Theodore
Member of the Firm
d 310.284.5640
f 310.557.2193
mtheodore@proskauer.com
www.proskauer.com

August 15, 2012

VIA FACSIMILE AND U.S. MAIL

John A. Rubin, Esq.
Field Attorney
National Labor Relations Board
Region 31
11150 West Olympic Boulevard
Suite 700
Los Angeles, California 90064-1825

Re: Mercury Public Affairs, LLC and Walmart
Case Number 31-CA-083730

Dear Mr. Rubin:

As you are aware, this firm represents Mercury Public Affairs, LLC ("Mercury" or "Company") with respect to the above-referenced matter. This letter constitutes the Company's statement of position in response to the allegations set forth in the Charge, as well as your letter dated July 22, 2012. By submitting this statement of position, the Company does not waive any defenses, procedural or substantive, not raised herein.

Warehouse Workers United ("Charging Party") alleges that on June 6, 2012, "the Employers engaged in unlawful surveillance and interrogation of an employee in violation of Section 8(a)(1) of the Act." On that date it is alleged (b) (6), (b) (7)(C) an "employee and/or agent of the Employers" signed in using a false name and identified (b) (6), (b) (7)(C) as a USC journalism student. During the course of the press conference it is alleged (b) (6), (b) (7)(C) interviewed an "employee."

Mercury categorically denies it violated the Act in any manner. Rather, as is readily apparent from the facts, (b) (6), (b) (7)(C) was not an "agent" for the purposes alleged. Even if (b) (6), was, the Act could not have been violated because the conduct would not be considered coercive under Board precedent. Indeed, "employee" (b) (6), (b) (7)(C) apparently did not work for Walmart (or Mercury) at the time of the incident.[1] The press conference was a matter open to

[1] See Huffington Post (b) (6), (b) (7)(C) where (b) (6), (b) (7)(C) described himself as a person who was not employed by Walmart for over a month prior to the events in this case. A true and correct copy of this blog post is attached hereto

the public, and was designed to disseminate information to an even greater public audience; it hardly qualifies as an event that could be unlawfully surveilled. Indeed, (b) (6), (b) (7)(C) was offered up by a representative of the LA Labor Federation as someone who could speak to the public issues being presented at the press conference, and has been quoted in the press several times.[2]

As we discussed, there is little factual dispute as to the events. (b) (6), (b) (7)(C) did attend the press conference and signed a clipboard using a false name.

To be clear, no one at Walmart and no one at Mercury authorized the actions taken by (b) (6), (b) (7)(C) at the press conference. (b) (6), (b) (7)(C) herself acknowledges that (b) (6), (b) made all the decisions (b) (6), (b) (7)(C). The instructions given to (b) (6), (b) (7)(C) were to attend the press conference and distribute Walmart's statement to any media in attendance. This is clear from the email exchanges between Walmart and Mercury, which copied (b) (6), (b) (7)(C) t. The email exchange clearly contemplates that (b) (6), (b) (7)(C) would attend this public event as a media relations representative who would be expected to identify (b) (6), (b) (7)(C) publicly as working on behalf of Walmart. Thus, the Walmart representative stated the expectations as follows:

> Just to confirm (b) (6), (b) (7)(C) of Mercury will monitor this press conference on-site tomorrow and distribute our statement, when available. (Please include me when it's available and I'll ensure our team has it.) (b) (6), (b) (7)(C) provide a readout immediately following. We'll touch base with reporters to ensure our final statement is included in any coverage. Please let me know how else I can help.

True and correct copies of the emails between Walmart and Mercury regarding the June 6, 2012 Press conference are attached hereto as Exhibit "B". Obviously, if the intention was for (b) (6), (b) (7)(C) to hand out Walmart's statement, then there was no reason for (b) (6), (b) to hide her identity, proof that this (b) (6), (b) (7)(C) took matters into (b) (6), (b) own hands.

What happened next shows (b) (6), (b) (7)(C) actions were taken on (b) (6), (b) own and were spur of the moment. The statement (b) (6), (b) (7)(C) was to have openly distributed on behalf of Walmart was not available at the time of the press conference. (b) (6), (b) (7)(C) had never attended a press conference hosted by an opposition group, and being a junior and inexperienced employee, was unsure of what (b) (6), (b) was supposed to do and called (b) (6), (b) immediate supervisor (b) (6), (b) (7)(C) for guidance. (b) (6), (b) (7)(C) states tha (b) (6), (b) (instructions were as follows:

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as Exhibit "A". Indeed, it is doubtfu (b) (6), (b) (7)(C) ever worked for Walmart, an important detail which has not been disclosed to us.

[2] When asked about (b) (6), (b) (7)(C) status as an "employee" the Region declined to provide any details citing the policy not to identify people who are allegedly involved in Section 8(a)(1) violations; it is truly doubtful this policy was meant to apply in these circumstances. We did not inquire as to what (b) (6) said, or even as to (b) (6), identity (anyone with internet access can figure that out); we asked about (b) (6), status as an employee because it is directly relevant to the case. The Region could have given that information even without disclosing the individual's name and not violated its policy.

> [redacted] instructed me to be a silent observer at the conference. [redacted] also told me to later report on the names of reporters and outlets present, as well as the number of people present, and what people were saying. The plan was to follow up with the media present and give only those media outlets Walmart's statement once it had been finalized.

A true and correct copy of [redacted] sworn affidavit is attached hereto as Exhibit "C" ([redacted] Affidavit"). [redacted] confirms these instructions. A true and correct copy of [redacted] sworn affidavit is attached hereto as Exhibit "D" ([redacted] Affidavit").

[redacted] walked into the building where the press conference was being held "and was not required to sign in or identify" [redacted]. [redacted] Affidavit, Paragraph 7. It was only after [redacted] was inside that [redacted] was handed a clipboard. As [redacted] stated,

> As this was the first press conference hosted by an opposition group that I had attended, I was unsure what to do and I did not have the time or opportunity to call [redacted] for advice on the matter. I decided to write down a nickname, [redacted]' which I have used since I was a kid, and that I was a USC student.

[redacted] Affidavit, Paragraph 7.

[redacted] engaged in small talk with one of the representatives at the press conference. The representative brought [redacted] over to talk to [redacted].

> Because I had been a journalism student during undergrad, I managed to come up with a few questions on the spot. As I had become accustomed in undergrad, I recorded the interview. I asked for [redacted] permission to record it and [redacted] agreed to it. [redacted] told me [redacted] was not currently working at a warehouse associated with Walmart, but [redacted] had worked there in the past. I asked [redacted] what were the complaints of [redacted] organization, and I recall [redacted] mentioning that the workers needed new equipment and better training. I did not retain a copy of this recording.

[redacted] Affidavit, Paragraph 9.

Neither Mercury nor its client knew of these actions, and [redacted] was terminated the day it was discovered, June 14. [redacted] affidavit, Paragraph 9. [redacted] acknowledges [redacted] acted outside of [redacted] instructions, "No one at Walmart or at Mercury told me to pretend I was a reporter or interview [redacted]. I took these actions on my own." [redacted] Affidavit, Paragraph 10. [redacted] also emphatically rejects any notion that Mercury would ever give instructions to any of its employees, "I did not instruct [redacted] to hide [redacted] identity, pretend to be a reporter, or to interview anyone present at the press conference. Such actions would never be acceptable for people in media relations." [redacted] Affidavit, Paragraph 8.

Mercury immediately issued a statement to the press repudiating the conduct, and unambiguously stating that the conduct was unauthorized, unapproved and unacceptable:

> The action taken by (b) (6), (b) (7)(C) was in no way approved, authorized, or directed by Walmart or Mercury. (b) (6), (b) (7)(C) is a junior member of our team who made an immature decision. (b) (6), (b) (7 showed very poor judgment and Mercury takes full responsibility. We will be taking the necessary disciplinary actions. This is an isolated incident that has never happened before and will not happen again.

Walmart also issued a statement to the press repudiating the conduct.

(b) (6), (b) (7)(C) a frequent speaker on this topic, gave interviews after (b) (6), (b) (7)(C) conduct became known clearly demonstrating that there could not have been a coercive element to the so-called "interrogation." (b) (6), (b) (7)(C) conduct was an error in judgment made by a junior employee, and under all the circumstances, could not have violated the Act.

I. (b) (6), (b) (7)(C) Was Not A Supervisor Or A General Agent, And Therefore (b) (6), (b) (7 Actions Were Not Unlawful

The undisputed facts show (b) (6), (b) (7)(C) was neither a supervisor nor general agent within the meaning of the Act. Without the presence of either status it is impossible for the Act to have been violated.

(b) (6), (b) (7)(C) was a '(b) (6), (b) (7)(C)' which in the world of public affairs is among the lowest level employee. (b) (6), (b) (7)(C) had no one reporting to (b) (6), (b) and did not possess a single indicia of supervisory authority set forth in Section 2(11) of the Act. Even if (b) (6), (b) (7)(C) was a statutory supervisor (which is unsupported by the facts), (b) (6), (b) would not have been in a position to assert that authority for the obvious reason that no one in a reporting relationship was present.

Therefore, (b) (6), (b) (7)(C) actions could only have implicated the Act if (b) (6), could be considered a general agent within the meaning of Section 2(13). The facts demonstrate conclusively that (b) (6), (b) (7)(C) was not a general agent, and that (b) (6), (b) actions went well beyond what (b) (6), was authorized to do and what was expected of (b) (6), (b); indeed, (b) (6), (b) was terminated for (b) (6), (b) unethical actions in a clear repudiation of the conduct.

As (b) (6), (b) (7)(C) acknowledges, (b) (6), (b) took the actions on (b) (6), (b) own without any authorization or instruction from either Walmart or Mercury. It is undisputed that (b) (6), (b) (7)(C) exceeded the clear expectations (which were normal press activities) and that neither Mercury nor Walmart authorized the activity.

There also is no evidence that (b) (6), (b) (7)(C) had apparent authority to act as a general agent. As the Board has held:

> Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. *NLRB v. Donkin's Inn*, 532 F.2d 138, 141 (9th Cir. 1976); *Alliance Rubber Co.*, 286 NLRB 645, 646 fn. 4 (1987). Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him or the principal should realize that this conduct is likely to create such a belief. Restatement 2d, *Agency* Section 27 (1958, Comment). **Two conditions, therefore must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. Id. at Section 8.**

Dentech Corp, 294 NLRB 924, 925 (1989) *quoting Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988) (emphasis supplied). The burden is on the party alleging the agency exists to prove it. *D.G. Real Estate, Inc.*, 312 NLRB No. 999, 999 (1993). Neither of these conditions can be met by Charging Party.

The test of apparent authority also has been articulated as whether "under all the circumstances, 'the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management.'" *Waterbed World*, 286 NLRB 425, 426-427 (1987) *quoting Einhorn Enterprises*, 279 NLRB 576 (1986). In *Waterbed World*, the alleged agent was a sales trainee (Torres) who, among other things, initialed changes on his and other employees' timecards and even gave some instructions to employees. The sales trainee was not found to be an agent because "no evidence was adduced that at the time of the alleged unlawful statements…that the Respondent had held Torres out as being privy to management decisions or as speaking with management's voice about these alleged unlawful matters or that employees perceived him as having such a role." 286 NLRB at 427. Similarly, at the time of [redacted] actions, there is no evidence that either Walmart or Mercury had held [redacted] out to the Charging Party or any actual employee, as anyone who had authority to speak for management. [redacted] was only authorized to talk to media people – and not even as an authorized spokesperson for Walmart. The sworn affidavits and corroborating emails setting forth the expectations of Walmart and Mercury demolish any notion that [redacted] would be sent to "spy" or "interrogate"; [redacted] was supposed to do only what press people do: identify which media outlets needed to be contacted to learn of Walmart's response.

The fact no proof exists about this issue is the main reason Mercury asked for additional information about the "arguable" *prima facie* case. Charging Party has the sole burden of proof in establishing [redacted] agency status; its failure to do so should result in an automatic dismissal of this case, absent withdrawal. Instead of addressing this issue, the Region's letter merely glosses over it, blithely characterizing [redacted] as an "employee and/or agent of the Employers."

Certainly, such evidence if it were to exist is important and should be disclosed; if Charging Party cannot supply such evidence then this Charge should be dismissed, absent withdrawal.

There was no "manifestation" by Walmart (or Mercury for that matter) to the Charging Party that [redacted] was empowered to do anything. [redacted] job was, in part, to attend press conferences, which [redacted] was asked to do on June 6, 2012; this press conference was the first of its kind for [redacted], so there can be no prior manifestation of intent to hold [redacted] out as an agent. Even if one were to assume a press conference sponsored by a labor organization was somehow a "union meeting" (which Mercury asserts it was not), asking a non-supervisory employee to merely attend an event open to the public is not a manifestation of general agency. Indeed, had [redacted] done what [redacted] was supposed to do, [redacted] would have identified [redacted] appropriately.

The Board found the General Counsel had failed to prove agency status in *D.G. Real Estate*, *supra*, stating, "That [principal] may have introduced [alleged agent] to union picketers as [principal's] real estate agent and had [alleged agent] attend union meeting with him, we find these limited and ambiguous actions fell far short of providing any reasonable basis for union members to believe that [alleged agent] was authorized to deal with Union on behalf of Respondent." Of course, the proof in this case is even less than what existed in *D.G. Real Estate*. In that case, the union meeting was a real one, where actual employees of an employer were present. In this case, there were no employees of either Walmart or Mercury present, and because it was [redacted] first opposition press conference, it is impossible for Charging Party to have understood [redacted] to have been cloaked with any authority to act on behalf of Mercury or Walmart.

[redacted] was certainly never held out to Charging Party as any kind of agent prior to the incident on June 6, 2012. Indeed, this was the first press conference held by any opposition group that [redacted] had attended. In trumpeting this issue to the public, the Charging Party admitted that Walmart was not engaging it in any discussion, let alone one where [redacted] played any role whatsoever:

> But, the big question is, why lie? For months warehouse workers have been asking to meet with Walmart. There have been many opportunities to sit down with workers…

A true and correct copy of the Charging Party's [redacted] blog post entitled [redacted] is attached hereto as Exhibit "E". The Charging Party thus admits that Walmart's actions were the exact opposite of what is necessary to prove agency status. Even [redacted] parroted this admission when [redacted] spoke to reporters about [redacted] ordeal: "I'm so disappointed that Walmart sent a spy instead of sitting down to discuss things." See Exhibit "A".

On or about June 13, 2012, when [redacted] attended an event with Walmart representatives, there still was no action taken to prove that Walmart "manifested" intent to have [redacted] be a general agent. [redacted] was there to talk to the media as a media relations representative. Even when [redacted]

was being harassed by a union agent videotaping [redacted]; [redacted] does not engage the Charging Party. [redacted] was not hired or authorized to engage in any discussion with the Charging Party.

[redacted] used a false name, which is proof of nothing other than [redacted] used a false name. There is no evidence that this action was endorsed, authorized or condoned; the facts show the opposite, that [redacted] admits [redacted] did it on [redacted] own and was not authorized to do what [redacted] did. After it became public, [redacted] acknowledged [redacted] actions, and [redacted] was promptly terminated. Simply put, there is no evidence that exists before during or after any the events in this case that supports a finding [redacted] was a general agent.

The Charging Party cannot point to a single fact that would provide a reasonable basis for its belief that [redacted] had authority which could impute liability to either employer. Within hours of the Charging Party going public with its discovery, the acts were repudiated clearly and unequivocally.

For these reasons alone, the charge should be dismissed, absent withdrawal. It is clear no *prima facie* case exists.

II. [redacted] Did Not Commit Surveillance Or Interrogate In Violation Of The Act

Even if evidence existed that could establish [redacted] was a general agent (which does not exist), [redacted] actions were regrettable but not unlawful.

Just because a person from a company asks a question of a person who is an employee even about labor issues does not automatically constitute unlawful interrogation. The test for determining whether an interrogation reasonably tends to restrain, coerce or interfere with rights guaranteed employees by the Act. *Rossmore House*, 269 NLRB 1176 (1984) enf'd 760 F.2d 1006 (9th Cir. 1989). In *Rossmore*, the Board stated, "Some factors that are considered factors which may be considered in analyzing alleged interrogations are: (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation." 269 NLRB at 1178, n. 20.

Here we have a [redacted], with no supervisory or general agent authority pretending to be a student journalist at a press conference. The press conference was entitled "Latina Leaders To Hold Press Conference On New Report Detailing Walmart's Negative Effects on the Local Economy" which may have been intended to discuss alleged working conditions in a particular segment of the economy. [redacted], believing [redacted] was talking to a college reporter, could not have been put into a position where [redacted] felt any coercion. [redacted] volunteered to talk publicly about [redacted] experiences and believed that it would be shared with a wider public audience; that was [redacted] intention. [redacted] attended the conference not as an employee of either employer, but as someone who was available for the express purpose of talking to the public because [redacted] may have worked previously for a contractor providing warehouse services to Walmart (but apparently not for Walmart). Under the circumstances, it is hard to imagine a case more removed from a coercive element. It is somewhat ironic that [redacted] and Charging Party actually received a greater voice due to [redacted] actions because

by all accounts the press conference on June 6, 2012 generated little media activity. Even after [redacted] actions became public, that information could not have transformed the June 6, 2012 conduct into a coercive interrogation because (a) Walmart and Mercury repudiated it immediately and (b) neither employer had any authority over [redacted] (whose employment status is unknown) to begin with. Indeed [redacted] obviously was unfazed by the whole event even after it became public and has not been deterred from doing what [redacted] was doing before: being a member of the public who speaks publicly on certain issues. In sum, there is no coercive element at all in the so-called "interrogation" and this allegation should be dismissed, absent withdrawal.

As to the surveillance allegation, this too must fail for similar reasons. It is axiomatic that in order for surveillance to occur, employees must be present. *See Wackenhut Corp.*, 348 NLRB 1290, 1291 (2006) (In the absence of employees or applicants for jobs with Respondent, "Respondent's conduct … did not constitute surveillance of Respondent's employees"). As noted, there is no evidence any employees were present at the press conference. The press conference was open to the public, and [redacted] walked in off the street without being required to check-in. Under the circumstances, it seems clear no unlawful surveillance occurred.

III. Mercury And Walmart Clearly Repudiated The Conduct

Even if the Region were to conclude that [redacted] unauthorized conduct somehow violated the Act, Mercury and Walmart clearly repudiated it. The Board held in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978) that "under certain circumstances" an employer can relieve itself of liability for unlawful conduct by repudiating it. To constitute an effective repudiation it must be (1) timely, (2) unambiguous, (3) specific in nature to the coercive conduct, (4) free from other proscribed illegal conduct, (5) must be adequately published, and (6) there must be no proscribed conduct on the employer's part after publication. All of these factors are present in this case with respect to both Walmart and Mercury.

Timeliness. The employers could not have been more timely. On the day the actions were discovered each issued a statement disavowing [redacted] conduct. Unambiguous. The statements made by each were very clear that the conduct was unacceptable and that they did not approve of, authorize or condone it. Indeed, Mercury confirmed to the media that it had terminated [redacted] employment immediately after it had done so. Specific. The statements were specific to the nature of the conduct. Free from other illegal conduct. There is no evidence either employer had engaged in any other conduct that could be considered unlawful. Adequate publication. Both statements were widely disseminated and further published in the media. [redacted] is quoted in some of the publications where the statements are also quoted. No proscribed conduct after the publication. There is no evidence either Mercury or Walmart engaged in any illegal activities after the statements were issued. In sum, it seems clear that if [redacted] actions were unlawful (which they were not), the employers effectively repudiated such conduct in a manner that would absolve them of liability.

****

We trust this statement of position and supporting documentation is enough to secure a dismissal of the charge. If you would like to discuss the matter further, please do not hesitate to call.

Very truly yours,

Mark Theodore

cc: Mori Pam Rubin, Regional Director
Joanna Silverman, Supervisory Field Attorney

EXHIBIT A

ATTACHMENT/EXHIBIT TO POSITION STATEMENT WITHHELD PURSUANT TO EXEMPTIONS 6 and 7(C)

EXHIBIT B

From: (b) (6), (b) (7)(C)
Sent: Tuesday, June 05, 2012 2:31 PM
To: (b) (6), (b) (7)(C)
Subject: Re: L.A. County Federation of Labor Press Conf 6/6

Great thanks!

From: (b) (6), (b) (7)(C)
Date: Tue, 5 Jun 2012 17:29:51 -0400
To: (b) (6), (b) (7)(C) Microsoft Office User
Subject: FW: L.A. County Federation of Labor Press Conf 6/6

FYI – and thanks.

From: (b) (6), (b) (7)(C)
Sent: Tuesday, June 05, 2012 2:30 PM
To: (b) (6), (b) (7)(C)
Cc: (b) (6), (b) (7)(C)
Subject: L.A. County Federation of Labor Press Conf 6/6

Hi Dan –

Just to confirm (b) (6), (b) (7)(C) of Mercury will monitor this press conference on-site tomorrow and distribute our statement, when available. (Please include me when it's available and I'll ensure our team has it.)

(b) (6), (b) (7) provide a readout immediately following. We'll touch base with reporters to ensure our final statement is included in any coverage. Please let me know how else I can help.

Thanks,

(b) (6), (b) (7)(C)

Walmart Stores, Inc.
P.O. Box 556493
Los Angeles, CA 90055
Save Money. Live Better.

From: Elizabeth Brennan [mailto:Elizabeth.Brennan@changetowin.org]
Sent: Monday, June 04, 2012 12:59 PM
To: (b) (6), (b) (7)(C)
Subject: Wednesday: New Report Detailing Walmart's Damaging Effects on Latino Workforce

For Immediate Release: Monday, June 4, 2012
Contact: Elizabeth Brennan at 213-999-2164

Latina Leaders to Hold Press Conference on New Report Detailing Walmart's Negative Effects on the Local Economy

NELP Report Reveals Working Conditions in the Warehousing and Logistics Sector Have a Profound Adverse Effect on Latinos in Southern California

LOS ANGELES - Walmart and other big box retailers have significantly lowered the quality of jobs and disproportionately impacted working Latinos in Southern California on a scale far greater than previously understood, a new report to be released Wednesday by the New York-based National

Employment Law Project reveals.

Local leaders along with warehouse workers will hold a press conference at the Los Angeles County Federation of Labor at 12 noon, Wednesday, June 6 to release "Chain of Greed" detailing Walmart's outsized influence in Southern California that keeps labor costs artificially low, masks responsibility for poor working conditions and drives down workplace safety standards.

The report's release comes on the heels of major criticism of Walmart for an alleged bribery scandal in Mexico, growing concerns about Walmart's plans to open a store in LA's Chinatown and demands at Walmart's shareholder meeting in Bentonville last week to increase transparency.

WHAT: Press Conference to release new national report, "Chain of Greed," by the National Employment Law Project
WHEN: 12 noon
Wednesday, June 6, 2012
WHERE: L.A. County Federation of Labor
2130 West 9th Street
Los Angeles, CA 90006
WHO: Maria Elena Durazo, secretary-treasurer of the Los Angeles County Federation of Labor
Guadalupe Palma, a campaign director for Warehouse Workers United
Angelica Salas, executive director of the Coalition for Humane Immigrant Rights of Los Angeles
Warehouse Workers who work moving Walmart Goods

###

Elizabeth Brennan
Communications Director
Warehouse Workers United
(213) 999-2164

EXHIBIT C

DECLARATION OF (b) (6), (b) (7)(C)

I, (b) (6), (b) (7)(C), declare:

1. I have personal knowledge of the facts stated in this declaration and, if called as a witness, I could and would testify competently thereto under oath.

2. I am making this declaration of my own free will. No threats or promises of benefits have been made to me in order to persuade me to sign this declaration.

3. Between (b) (6), (b) (7)(C) and (b) (6), (b) (7) 2012, I worked at Mercury Public Affairs ("Mercury") as a (b) (6), (b) (7)(C). I worked out of the Mercury office in Los Angeles.

4. One of Mercury's clients is Walmart, for whom I did a lot of the media work, including responding to media inquiries and distributing statements written by Walmart to local news outlets. Between (b) (6), (b) (7) 2012 and (b) (6), (b) 2012 (b) (6), (b) (7)(C), Mercury's (b) (6), (b) (7)(C) oversaw all the work that I did for Walmart. (b) (6), (b) (7)(C) works out of Mercury's Sacramento office.

5. On June 5, 2012, public relations people at Walmart asked me to monitor a press conference at L.A. County Federation of Labor. As is common, several media outlets had asked whether Walmart would have a response. My job was to hand out a statement to the press prepared by Walmart. The press conference was to take place on June 6, 2012 and was hosted by Warehouse Workers United. Because the press conference was focused on Walmart's alleged negative effects on Latinos, I expected that it would receive coverage primarily in Spanish-language media outlets. However, I had already been contacted by ABC News and was unsure if the press conference would receive coverage by ABC or other English-language media outlets.

6. As usual, I was waiting for Walmart to prepare a statement to give to me, which I would then distribute at the press conference. Unfortunately, there was some issue with getting the statement, so I had to go without one. Prior to going to the conference, I called (b) (6), (b) (7)(C) on the phone and asked what I was supposed to do at the conference because I would not have a statement to distribute. (b) (6), (b) (7)(C) instructed me to be a silent observer at the conference. (b) (6), (b) also told me to later report on the names of reporters and outlets present, as well the number of people present, and what people were saying. The plan was to follow up with the media present and give only those media outlets Walmart's statement once it had been finalized.

7. I walked into the building at the time the press conference was being held and was not required to sign in or identify myself. Shortly after I entered the meeting room where the press conference was being held, I was handed a clipboard and told to sign in. As this was the first press conference hosted by an opposition group that I had attended, I was unsure what to do and I did not have the time or opportunity to call [redacted] for advice on the matter. I decided to write down a nickname, [redacted]," which I have used since I was a kid, and that I was a USC student.

8. During the press conference, I took note of the reporters and media outlets present. The press conference was conducted primarily in Spanish and I noticed primarily Spanish-language media outlets. I was unsure if there were any English-language media outlets present or even any English speakers available for interviews. At some point, a woman approached me and engaged in small talk. I asked whether there were any people there to be interviewed who spoke English. Before I could say anything, the woman led me to [redacted], an English-speaking person, and told me I could talk to [redacted] as [redacted] had worked in warehouses.

9. Because I had been a journalism student during undergrad, I managed to come up with a few questions on the spot. As I had become accustomed in undergrad, I recorded the interview. I asked for [redacted] permission to record it and [redacted] agreed to it. [redacted] told me that [redacted] was not currently working at a warehouse associated with Walmart, but [redacted] had worked there in the past. I asked [redacted] what were the complaints of his organization, and I recall [redacted] mentioning that the workers needed new equipment and better training. I did not retain a copy of this recording.

10. No one at Walmart or at Mercury told me to pretend I was a reporter or interview [redacted]. I took these actions on my own.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct, and this declaration was executed on the 9th day of August, 2012, at Los Angeles, California.

[redacted]

EXHIBIT D

DECLARATION OF (b) (6), (b) (7)(C)

I, (b) (6), (b) (7)(C), declare:

1. I have personal knowledge of the facts stated in this declaration and, if called as a witness, I could and would testify competently thereto under oath.

2. I am making this declaration of my own free will. No threats or promises of benefits have been made to me in order to persuade me to sign this declaration.

3. I am currently the (b) (6), (b) (7)(C) at Mercury Public Affairs ("Mercury"). I work out of the Mercury office in Sacramento. I was hired by Mercury as a (b) (6), (b) (7)(C) in (b) (6), (b) (7)(C) I became the (b) (6), (b) (7)(C) in approximately (b) (6), (b) (7)(C) 2011.

4. One of Mercury's clients is Walmart. In my role as (b) (6), (b) (7)(C) I manage Walmart and oversee most activity related to Walmart.

5. (b) (6), (b) (7)(C) was a (b) (6), (b) (7)(C) at Mercury, who worked out of the Los Angeles office. I managed a lot of the Walmart-related work that (b) (6), (b) (7) was doing.

6. On June 5, 2012, (b) (6), (b) (7)(C), the (b) (6), (b) (7)(C) at Walmart, informed us that (b) (6), (b) (7)(C) would monitor a press conference at L.A. County Federation of Labor which would take place on June 6, 2012 hosted by Warehouse Workers United.

7. Walmart planned on preparing an approved statement to give to (b) (6), (b) (7)(C), which (b) (6), (b) would distribute at the press conference. There was a delay getting the statement and (b) (6), (b) (7)(C) had to attend without a statement. On June 6, 2012, prior to the event, I spoke to (b) (6), (b) (7)(C) on the telephone and confirmed that I only wanted (b) (6), (to be a silent observer at the conference. I told (b) (6), (b) to prepare a report on the number of people present, the type of media, and what people were saying.

8. I did not instruct (b) (6), (b) (7)(C) to hide (b) (6), (b) identity, pretend to be a reporter, or to interview anyone present at the press conference. Such actions would never be acceptable for people in media relations.

9. When Mercury was made aware of (b) (6), (b) (7)(C) unauthorized and inappropriate

actions at the press conference, (b) (6), (b) (7)(C) was terminated.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct, and this declaration was executed on the 14th day of August 2012, at Sacramento, California.

(b) (6), (b) (7)(C)

EXHIBIT E

ATTACHMENT/EXHIBIT TO POSITION STATEMENT WITHHELD PURSUANT TO EXEMPTIONS 6 and 7(C)

GIBSON DUNN

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Client: 95358-00486

March 26, 2013

VIA EMAIL (BARRY.KEARNEY@NLRB.GOV) AND U.S. MAIL

Barry J. Kearney, Esq.
Associate General Counsel
National Labor Relations Board
Division of Advice
1099 14th Street, N.W.
Room 10406
Washington, D.C. 20570-0001

Re: Mercury Public Affairs and Walmart, Case Nos. 31-CA-083730 and 31-CA-087964

Dear Mr. Kearney:

Thank you all again for the opportunity to meet with you in our teleconference meeting on March 15. As promised then, we are providing this written submission addressing the issues and cases that were raised in the February 13 email from Meghan Phillips. This submission will address the lack of agency authority and the lack of unlawful surveillance and the cases Ms. Phillips cited in her February 13 email. Mark Theodore of Mercury Public Affairs will address separately the fact that (b) (6), (b) (7)(C) was not an employee under Section 2 and that there was no coercion or interference with Section 7 rights.

As we indicated, we believe each of these issues represent huge hurdles to finding a violation here and would involve major and unjustified departure from Board and U.S. Supreme Court law.

I. There Is No Express, Implied Or Apparent Authority For (b) (6), (b) (7)(C) Actions To Hold Walmart Or Mercury Responsible For Such Actions And None Of The Cases Cited By Advice Are Applicable To Our Case.

A. The scope of authority given to (b) (6), (b) (7)(C) was clear and limited: "to be a silent observer at the conference" and "to report the names of reporters and media outlets present, as well as the number of people present and what people were saying." (b) (6), (b) (7)(C) declaration) (See also declaration of (b) (6), (b) (7)(C) of Mercury Public Affairs, who gave (b) (6), (b) (7)(C) her instructions and states the same thing.)

1. This purpose was entirely lawful.

2. Context: There is no other evidence of any unlawful activity before or after the event by Walmart or Mercury.

3. Additional Facts: [redacted] did not tell Mercury or Walmart that [redacted] had misrepresented [redacted] as a reporter/journalist from USC or that [redacted] interviewed [redacted], was at the press conference to tell [redacted] story and [redacted] views to the press and the public. [redacted] believed [redacted] was talking to a reporter (as [redacted] and the union stated in the press repeatedly).

4. Theories of Authority (Express, Implied and Apparent)

(a) There is no question that [redacted] did not have apparent authority because there was no manifestation by the principals to anyone that [redacted] had authority to conduct [redacted] the way [redacted] did.

(b) We also know that there is no express authority and there is absolutely no evidence to the contrary.

(c) The only way Walmart or Mercury could be held liable is if [redacted] had "actual authority" implied from the authority [redacted] was given.

(d) But you can't get actual authority to lie about [redacted] identity and misrepresent [redacted] and to interview [redacted], or to conduct surveillance of employees, from the authority [redacted] was given -- "to be a silent observer and to report the names of reporters and media outlets present, and the number of people present and what people were saying."

5. The cases cited by Advice are distinguishable and not relevant to our case.

B. *Walmart Stores, Inc.* (350 NLRB 879) (2007) is an actual authority case and is not at all applicable to our case. In the *Walmart Stores* case, actual authority was found based on things not present here:

1. The alleged agent was a management trainee of Walmart at the store who seized the union flyers from an employee who was handing them out. The Board relied on the facts that the management trainees had "responsibility for directing employees' work, their presence at disciplinary meetings as representatives of management, . . . and their attendance at management meetings." (at 883)

([redacted] was not a manager or supervisor at Mercury, and not even an employee of Walmart; [redacted] had none of the kind of authority present in the *Walmart Stores, Inc.* case.)

2. The Board in *Walmart Stores* also relied on the fact that the Respondent communicated to management trainees "that trainees were to report on union activity with the goal of 'stopping' it". (at 884) The management trainee was given that authority and seizing the union handbills was within the scope of her actual authority and the goal of stopping union activity stated to her.

(In our case, neither Walmart nor Mercury gave [redacted] any such instruction; both the affidavits of Mercury's [redacted] and of the fired [redacted] confirmed that [redacted] was instructed "to be a silent observer at the press conference" and "to report on the names of reporters and outlets present, as well as the number of people present, and what people were saying." Both [redacted] and Mercury's declarations also confirm that neither Mercury nor Walmart told [redacted] to pretend to be a reporter or interview anyone at the press conference – "I took those actions on my own." [redacted] was given the specific instructions to be a silent observer and to report the number of people, what people were saying, and the names of reporters/media there so that Walmart's statement could be given to those media outlets present. Neither Mercury nor Walmart manifested any authority to [redacted] to pretend to be a reporter or to interview anyone, and the day Mercury found out what [redacted] did, Mercury fired [redacted]. Those actions were not within [redacted] authority.

3. The Board in *Walmart Stores* also found that the management trainee "would reasonably have believed that the Respondent desired her to [seize the union handbills]" based on the Respondent's instruction to her "to report on union activity with the goal of stopping it." (at 884)

(In our case, [redacted] did not and could not have reasonably believed from Mercury/Walmart's instructions that Mercury/Walmart wished [redacted] to pretend to be a reporter or to interview [redacted]. [redacted] declaration disavows any such belief. [redacted] says "I took those actions on my own." In addition, the fact that [redacted] did not report to Mercury or Walmart [redacted] interview of Castaneda or that [redacted] had pretended to be a reporter until the union discovered [redacted] identity a week later at another press conference, confirms that [redacted] did not believe that Mercury or Walmart wished to take those actions.)

So the *Walmart Stores* case is simply not at all applicable to our case and does nothing to show authority on the part of [redacted] to do the things [redacted] did.

C. The *National Paper Co.* and *Clark Stores* cases are not at all applicable to our case.

1. In both *National Paper* (102 NLRB 1569) (1953) and *Clark Stores* (168 NLRB 273) (1967), the employer hired the guards involved to "keep the employees under surveillance" and "to police its plant with armed guards" (*National Paper*, at 1569 and 1572) and the employer "told the guards to 'keep their eye' on the organizers" (*Clark Stores*, at 273). In both cases, the employer's surveillance at the facility was for an unlawful purpose to start with and a violation itself.

(a) So when one of the armed guards in *National Paper* made calls to the union secretary Sanders and her mother, "threatening both of them, as well as Sander's child, with physical harm because of Sanders' union activity" (102 NLRB at 1571) and a similar call to a striker, the Board found "such conduct was, therefore, not outside the general scope of his authority and employment" (Id. at 1572), which was to surveil and police the employees.

(b) And when the guards in *Clark Stores* (who were off-duty police officers) stood outside the union meeting hall for two hours (while on police duty) and "observed employees entering and leaving a union meeting" (168 NLRB 273), they "were engaged in surveillance of the employees who attended the meeting and that, in doing so, they were acting within their authority as Respondent's agents to 'keep an eye' on the organizing campaign" (Id. at 273-74). (Also, "in accordance with his instructions to 'keep an eye' on organizers, unlawfully threatened employee Palmer and warned employee Joiner in connection with their union activity "(Id. at 274).

(c) In both *National Paper* and *Clark Stores*, the guards' unlawful conduct was consistent with the authority they were given to surveil and police employees and to keep an eye on the organizers. Those cases are entirely different from our case.

(d) (b) (6), (b) (7)(C) was given no such authority to surveil or police or keep an eye on or interrogate employees. (b) (6), (b) (7)(C) and Mercury's declarations (as well as emails between (b) (6), (b) (7)(C) Mercury and Walmart) have all stated so and that (b) (6), was instructed to be a silent observer and to report the names of reporters and media present and what was said at the public press conference so that Walmart could later respond to those media. (b) (6), (b) (7)(C) declaration stated (b) (6), was not told to misrepresent (b) (6), identity nor to interview anyone, that (b) (6), did those things on her own. There is no possible evidence to the contrary as to what (b) (6), authority was since the fired (b) (6), (b) (7)(C), Mercury and Walmart have all stated (b) (6), limited authority. Interrogation and surveillance were not within (b) (6), authority (express or implied).

2. In both *National Paper* and *Clark Stores*, the employer principal engaged in a "whole pattern of unlawful anti-union conduct" (p. 1569) and "other unlawful conduct" (p. 274), and the Board found the guards' conduct to be part of the employer's pattern of unlawful conduct. In our case, there was no pattern of unlawful conduct. Neither Walmart nor Mercury engaged in any unlawful conduct before or after the press conference.

3. There is a third difference between our case and the *National Paper* and *Clark Stores* cases. In both those two cases, the employees saw on a daily basis that these same guards were there at the facility to watch them. That fact conveyed to the employees that these guards had some apparent authority to watch over them and police them. So when those same guards watched the employees at the union meeting or called them at home and made threatening statements to them, the employees and the Board could conclude that the guards had apparent authority to do these things.

But in our case neither Mercury nor Walmart did anything to convey to the interviewee (b) (6), (b) (7)(C) or anyone else at the public press conference anything about (b) (6), (b) (7)(C), much less authority from Mercury or Walmart for (b) (6), to interrogate or surveil the interviewee or any employee. There is no basis for (b) (6), (b) (7)(C), nor anyone else at the press conference or the Board, to conclude that (b) (6), (b) (7)(C) had apparent authority to interrogate or engage in surveillance.

4. In sum, (b) (6), (b) (7)(C) misrepresentation of (b) (6), (b) (7)(C) as a reporter, (b) (6), interview of (b) (6), (b) (7)(C), (and any alleged employee surveillance) were not within (b) (6), authority or (b) (6), instructions from Mercury/Walmart "to be a silent observer at the [press] conference" and "to later report on the names of reporters and outlets present, as well as the number of people present, and what they were saying." ((b) (6), (b) (7)(C) Declaration)

II. **There Was No Unlawful Surveillance Here.**

A. The cases cited by Advice do not change that result and each of those cases involves surveillance by the charged employer of its own employees (as do all Board cases finding unlawful surveillance).

1. In the *U.S. Steel Corp.* and *Computed Time* cases, the 5th Circuit rejected a per se approach to surveillance, stated that: "Rather, 'in order for an employer to violate Section 8(a)(1) by illegal surveillance . . . he must 'interfere, restrain, or coerce' employees in the exercise of their Section 7 rights'". (682 F.2d 101-102). In both *U.S. Steel* and *Computed Time*, the 5th Circuit found no interference or coercion and therefore no unlawful surveillance.

(a) In *U.S. Steel*, the Court also noted at footnote 17 that "the employees and the union actively sought publicity of their demonstration" and "the public and the media were given advance notice of the demonstration." "We simply note that the seeking of advance publicity may be a relevant factor in determining, whether, under the circumstances, employees feared future reprisals." In our case also, the union and Castaneda actively sought publicity at their press conference.

(b) In both *U.S. Steel* and *Computed Time*, employees of the charged party were the ones subject to the surveillance. But no unlawful surveillance was found.

(c) In *Computed time*, a supervisor attended a union organizational meeting that occurred not at the employer's property, but in a building the union chose elsewhere. Since there was no interference or coercion, no unlawful surveillance was found.

2. Likewise, in *Southwire Co.* (429 F.2d 1050) (5th Cir. 1970), employees of the charged party were the subject of surveillance.

(a) Critically different from our case, in *Southwire*, the employer "placed undercover agents in the plant who masqueraded as ordinary employees." (at 1054) In our case, Walmart and Mercury did not place undercover agents in, much less spy on employees' union activities.

(b) In *Southwire*, "it is a reasonable inference that such information received from its [undercover] agents provided the Company with a knowledge of the union leaders' activities and facilitated the Company's harsh reprisals." (at 1054-1055) In our case, no such reasonable of interference can be made, and no interference or reprisals occurred. First of all, this was a public press conference called by the union seeking publicity. Second, Walmart/Mercury neither asked [redacted] to misrepresent [redacted] identity, nor to interview anyone, nor to spy on employees. Nor did Walmart receive any information on employees' union activities from [redacted]. Finally, both then and now, Walmart/Mercury are unaware of any Walmart/Mercury employee being at the public press conference.

3. *Virginia Elec. & Power Co.*, 44 NLRB 404, 427 (1942), again involved employees of the charged party, who violated the Act "by employing an undercover operative to report on organizational activities of its Norfolk employees and by questioning employees suspected of engaging in union activities as to such matters." (at 427) None of that occurred in our case. Walmart did not employ Mercury or [redacted] as an "undercover agent" [redacted] misrepresented [redacted] as a reporter entirely on [redacted] own), nor did Walmart

employ Mercury or [redacted] "to report on organizational activities of its employees," nor "to question employees suspected of engaging in union activities." (In addition, [redacted], the person [redacted] interviewed, was not a Walmart employee, but rather simply a person who chose to be interviewed by the press at the public press conference and state publicly [redacted] support of the WWU and [redacted] views about Walmart.)

4. All of the surveillance cases cited by Advice involved surveillance of the charged party's employees. None of those cases depart from the fact that the Board has only found unlawful surveillance by the charged employer of its own employees. To suggest otherwise would be an unjustified and major change of Board law.

B. The *Wackenhut*, *Maclean Power Systems*, *Ark Las Vegas Restaurant Corp.*, *The Continental Group, Inc.* and other surveillance cases cited by Walmart/Mercury in their Statements of Position are the applicable cases and do not involve employer property rights, contrary to Advice's suggested distinction.

Advice expresses concern that "the cases you cite (e.g., *Wackenhut* . . .) for the principle that an employee must be an employee or job applicant to the charged party in order to conclude that surveillance occurred are not applicable outside of the context where an employer's property rights under *Lechmere*, such as the right to prohibit non-employees from trespassing or to ensure safety on its property are at issue." That concern and suggested distinction expressed by Advice is totally at odds with the facts stated in *Wackenhut* (as well as other cases)

1. In *Wackenhut*, 348 NLRB 1290 (2006), the Board found no surveillance where Respondent's supervisors were standing next to "4 union organizers assembled on the sidewalk outside the IMF [Respondent's] headquarters to distribute union literature to Respondent's employees" (at 1290). "It is undisputed that O'Connor [union organizer] was at all relevant times on Mar 3, standing on public property -- the sidewalk area beyond security barricades set up around IMF headquarters by Respondent" (ALJ p. 49).

(a) So *Wackenhut* simply did not involve surveillance on the employer's property, but rather surveillance on public property specifically. No *Lechmere* rights were involved. *Wackenhut* simply cannot be distinguished on the basis of employer property rights.

(b) Thus, *Wackenhut* is equally applicable to our Walmart case where the alleged surveillance also occurred not on the employer's property, but off of and, indeed, far away from the employer's property.

(c) In fact, our case follows a fortiori from *Wackenhut* because in our case, the alleged conduct not only occurred much farther away from any Walmart or Mercury property, but at a public press conference called by the union.

(d) Therefore, *Wackenhut's* holding and stated principle about surveillance applies even more strongly to our case:

> "Neither O'Connor nor the other union organizers were employees of, or applicants for jobs with, Respondent. In other words, they had neither an employment relationship, nor were they seeking such a relationship with Respondent. Consequently, the Respondent's conduct on March 3 did not constitute surveillance of Respondent's employees." (at 1291)

(e) Likewise, neither (b) (6), (b) (7)(C) nor others at the public press conference were employees of or applicants to either Walmart or Mercury, and "consequently (b) (6), (b) (7)(C) alleged conduct did not constitute surveillance of Walmart or Mercury employees."

(f) The Board in *Wackenhut* also noted "There is no evidence that any of Respondent's employees observed the supervisors' conduct during this period." (at 1291) Likewise, in our case, not only is there no evidence that any Walmart or Mercury employee observed (b) (6), (b) (7)(C) alleged surveillance, but, in addition, neither Walmart nor Mercury nor (b) (6), (b) (7)(C) were or are aware of any Walmart employee being present at the public press conference (nor were Walmart, Mercury nor (b) (6), (b) (7)(C) interested in whether any Walmart employee was there).

2. *St. Mary's Hospital*, 316 NLRB 947 (1995), also cannot be distinguished from our case on the incorrect basis that *St. Mary's* only involved surveillance on the employer's property. In *St. Mary's*:

> [The union agents] leafleted from a public sidewalk adjacent to the island [entrance to the visitor's parking garage]. During some of this period, including the time the agents leafleted on the public sidewalk, [security guard] Silva stood nearby and observed the activity. As drivers would accept the leaflets, Silva would write something on a note pad." (at 947)

(a) So, as with *Wackenhut*, *St. Mary's* did not involve alleged surveillance on the employer's property, but rather on public property - the public sidewalk.

(b) *St. Mary's* found that there was no surveillance or impression of surveillance.

(c) Again, in our case as well, the alleged surveillance did not take place on the employer's property, but at a public press conference called by the union, and there is no evidence that (b) (6), (b) (7)(C) conduct was directed at any of Walmart's or Mercury's employees.

(d) So the distinction that Advice's email to us suggests that our cited surveillance cases are limited to surveillance on the employer's property, just doesn't square with the facts of those cases.

C. In addition, other cases finding no unlawful surveillance, which we cited (like *Ark Las Vegas Restaurant Corp.*, 333 NLRB 1284 (2001), and *The Continental Group, Inc.*, 353 NLRB 348 (2008)) are directly on point to our case.

1. In *Ark Las Vegas*, the Board rejected surveillance and interrogation charges where:

> "[the employee] had gone to the [union] rally in full view of everyone who wanted to look. Indeed, it was such a public matter that 'surveillance' seems to be an antilogy in the circumstances. The Union was pleading for the world to look and listen. That [the Supervisor] observed what was happening can be no surprise." (at 1303)

(a) Likewise, in our case, the union called a public press conference to tell its story to the world and (b) (6), (b) (7)(C) was there to be interviewed and quoted in the press and to tell (b) (6), story to the world. Surveillance in this case is an oxymoron.

2. The *Continental Group* case is also directly applicable to our case. The Board found that Continental officials had not engaged in unlawful surveillance by attending a press conference sponsored by a union (at 348 fn. 7 and 357). The one non-supervisory employee attending the union press conference did not know at the time that any Continental officials were in attendance, and there was no evidence that the Continental official's actions "impinged" on the employee's rights. The employer's mere presence at the union press conference was not unlawful surveillance.

(a) Similarly, there is no evidence that (b) (6), (b) (7)(C) conduct (also at a union press conference) impinged on the rights of any Walmart or Mercury employee.

III. **Regarding The Interrogation Charge, In addition To [redacted] Not Being A Statutory Employee And To [redacted] Not Having Any Authority To Interview [redacted], There Was Nothing Coercive In [redacted] Interview Of [redacted]**

A. Interrogation is not unlawful without coercion.

1. This is doubly true of questioning of an open union supporter, like Castaneda. (*Milieu Textile Services Co.*, 357 NLRB No. 169 (Dec. 30, 2011) and *UNITE HERE Local 11 v. NLRB*, 720 F2d 1006 (9th Cir. 1985).

2. There was no coercion here under the Bourne factors. (See pp. 5-7 of WM's Aug. 15, 2012 position statement.)

3. [redacted] was at the public press conference at the AFL-CIO office to be interviewed and to tell [redacted] story to the world and [redacted] views about the union and Walmart. There was nothing coercive about [redacted] questioning of [redacted].

As we said in the teleconference, we do not believe there is any valid basis for finding a violation here. Despite no violation of the law, Walmart and Mercury immediately and publicly condemned [redacted] unauthorized actions in not properly identifying [redacted] and misrepresenting [redacted], as being "unacceptable, misleading and wrong" and have taken steps to ensure that such conduct does not happen again. We appreciate the opportunity to submit this letter addressing the concerns and cases you previously raised. We think it should be helpful to disposing of the charges.

Yours truly,

Scott A. Kruse

Attorney for the Employer

cc: Lafe Solomon (via email)
Celeste Mattina (via email)
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Re: Mercury Public Affairs LLC
NLRB Case No. 31-CA-087966

Dear Mr. Kearney:

As you are aware, this firm represents Mercury Public Affairs LLC ("Mercury" or "Company") with respect to the above-referenced matter. Thank you very much for giving counsel for Wal-Mart, Scott Kruse, and myself the opportunity to meet with you to discuss the legal issues in this case. We very much appreciate being able to express our views on the events concerning the June 2012 press conference. Please accept this letter as the supplemental submission on behalf of the Charged Parties. This letter addresses the issues of employee status under the Act, as well as the lack of any coercive element with respect to (b) (6), (b) (7)(C) actions at the public press conference. Mr. Kruse will address separately the issues of agency and surveillance.

It seems clear that there exists some reservations at the agency about the applicability of the Act to the individuals and events of this case. Respectfully, the case law cited to us is readily distinguishable and actually supports the Charged Parties' assertions that no violation of the Act could have occurred as a result of the unfortunate incident involving (b) (6), (b) (7)(C).

I. No Section 2(3) Employee Was Involved

It is apparent that (b) (6), (b) (7)(C) is not a statutory "employee." (b) (6), (b) (7)(C) did not work for Wal-Mart or Mecury. While (b) (6), (b) (7)(C) may have worked for a warehouse in California that may have handled goods for Wal-Mart, (b) (6) was was unemployed at the time of the press conference.

The cases cited to us for discussion at the March 15 videoconference are all distinguishable, and support a finding that no "employee" was involved in the incidents of this case.

Fabric Services, Inc., 190 NLRB 540, 542 (1971).

- Involved a property owner's requirement that an employee (Smoak) working for a vendor remove his union insignia in order to work on employer's premises.

- The employer property owner defended on the sole ground that it was not employee's employer.
- The ALJ, who was affirmed by the Board, rested his finding that Smoak was an employee based on the power and control exercised by the property owner employer: "Fabric Services, by virtue of its ownership of the property and its power to evict Smoak from its premises, was in a position of sufficient control effectively to enforce its direction to Smoak, in substance, either to remove his union pocket protector or get off its property and cease performing the work. Its demand, I find, constituted a direct interference with Smoak's protected right to wear a union insignia at work. Though perhaps different in degree, Fabric Services' interference with Smoak's protected right was not essentially different from what it would have been had Fabric Services used physical force to remove Smoak's union insignia." *Id.* at 542 (emphasis supplied).
- The case involved a direct contractual relationship between an employer and an outside vendor. The vendor's employee was a direct economic beneficiary of the contract by being allowed to perform work for compensation on the property owner employer's premises. By contrast, there was never any direct contractual relationship where Wal-Mart (or Mercury) could have exercised any kind of control over (b) (6), (b) (7)(C). In addition, and of equal importance, there was no direct interference of any kind as (b) (6), (b) (7)(C) was at the press conference to talk publicly about (b) (6), experiences. There is no comparison between Smoak (who was directed to stop engaging in union activity) and (b) (6), (b) (7)(C) who did not receive any direct threat, and did what (b) (6) came to the press conference to do: talk to the public. The case is even farther removed from applicability by the fact (b) (6), (b) (7)(C) was not even employed by any employer, let alone the Charged Parties, at the time of the incident.

Neo-Life of America, 273 NLRB 72, 73 (1984) is similarly distinguishable.

- Patson was a contractor-employer that performed delivery services for Charged Party.
- Patson employee, Regan, was assigned "full time" to perform services to Charged Party.
- Regan became involved in union activities at Charged Party.
- Regan was called to a meeting at Charged Party's offices where Regan was directly asked whether he was attending union meetings.
- Patterson (a supervisor within the meaning of Section 2(11) of contractor) stated in Charged Party's presence that Patson could lose business if Charged Party went union. The Board found Charged Party "adopted the statements by silence."
- This case is distinguishable because Regan was an actual employee of a contractor who performed services full-time for Charged Party, at Charged Party's premises. Thus, as with all cases, Regan was a direct economic beneficiary of the relationship between the two employers.
- The circumstances of the meeting with two supervisors of the respective employers were objectively coercive. The meeting was held in a supervisor's office. The statements made to Regan were objectively coercive, with a direct link of a loss of work if Regan continued engaging in union activity. The threat to Regan would mean he likely would have lost his job as he performed services full time for Charged Party. The remarks were deemed adopted by the employer because its representative did not disavow the remarks.

- In the case before you, the discussion between (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) did not take place in a supervisor's office, let alone at a location even remotely connected to either employer. (b) (6), (b) (7)(C) was a voluntary attendee to a public press conference; (b) (6) was not summoned by either Charged Party. There is no evidence of any unlawful statements by (b) (6), (b) (7)(C) or other coercive activity. Neither Mercury nor Wal-Mart can be said to have adopted the conduct of (b) (6), (b) (7)(C). Indeed, the opposite is true: (b) (6), (was terminated the day it became known.

A.M. Steigerwald Co., 236 NLRB 1512 (1978).

- Employees of the Charged Party sought union, and a representation election was pending.
- The credit union of the employer, which provided financial services to the employees, maintained a bylaw which expressly limited membership to employees "not covered by a collective bargaining agreement." *Id.* at 1513
- The credit union sent each employee a letter during the representation campaign which stated the employees would become "ineligible" to join credit union if they voted in the union.
- The credit union provided direct financial services to employees of the Charged Party, which were threatened to be taken away should employees exercise their right to select the union.
- By contrast, the context of this case involved a public press conference, not a union representation campaign in the critical period where statements are viewed with additional scrutiny. No direct threat was made here. Whether (b) (6), (b) (7)(C) was actually reporter or not is immaterial; (b) (6), (was never in any position, at the time and certainly not after when (b) (6), (was termianted, to make such a direct link between any activity by (b) (6), (b) (7)(C) and the loss of any tangible economic benefit.

New York, New York, 356 NLRB No. 110 (2011).

- Casino contracted to have restaurants on premises.
- Off-duty employees of contractor restaurant were prohibited by casino from distributing handbills on casino property.
- Casino exercised direct control over the employees of contractor using its property interests, and even required adherence to a number of its policies.
- This was a case on remand from the district of Columbia which considered the ultimate question to be whether the employees of the contractor should be considered employees or non-employees of the property owner
- The Board rejected the framework of the property interests set forth in *Lechmere* and *Republic Aviation* in favor of showing the interests of the employees were derived from their alignment with the casino's employees. "They worked there regularly for an employer with a close economic relationship to NYNY." Slip op. p. 10 (emphasis supplied).

The Board stressed that it was a narrow ruling and reached an accommodation that the property owner could exclude off duty employees of a contractor if it could show a disruption to business.

By contrast, again, the Charged Parties in this case simply never were in a position to exercise direct control over anything involving (b) (6), (b) (7)(C); indeed, (b) (6), (b) (7)(C) was not employed at the time at all.

As we indicated during the videoconference, we conducted our own research of this issue. The applicable case law concerning employee status which controls this case is Supreme Court precedent. That precedent, which consists of *NLRB v. Town & Country Electric*, *Phelps Dodge Corp. v. NLRB* and *Chemical Workers v. Pittsburgh Plate Glass*, all of which require the existence of "at least a rudimentary economic relationship, **actual or anticipated**, between employee and employer." *See WBAI Pacifica Foundation*, 328 NLRB 1273, 1274 (1999). (emphasis supplied). The decision in *WBAI* explained in detail the Board's position in light of the Supreme Court precedent.

- This case was a UC petition to include unpaid staff under a collective bargaining relationship.
- Members Liebman, Fox and Hurtgen unanimously overruled a Regional Director's determination that the unpaid staff were employees under the Act. In doing so the Board reviewed the applicable Supreme Court precedent and concluded that there must be a direct economic relationship in order for an individual to be deemed a statutory employee.
- The Board discussed the three Supreme Court cases, starting with *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995) which held that union salts who were also working for and paid by the employer were statutory employees. The Court used dictionary definition of employee, which includes compensation:

> "The ordinary dictionary definition of "employee' includes any 'person who works for another in return for financial or other compensation.' American Heritage Dictionary 604 (3d ed. 1992). Se also Black's Law Dictionary 525 (6th ed. 1990) (an employee is a 'person in the service of another under any contract of hire, express or implied, oral or written where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed')."

516 U.S. at 90.

- The Board also reviewed the Supreme Court's Decision in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), finding applicants of employment to be employees based on a rationale that "similarly relied on economic relationships. The denial of employment to applicants because of their union affiliation not only prevented the applicants from entering the employer's workforce, it also had an adverse impact on those already employees of the employer."[1] The Board noted "although the applicants did not receive

[1] During our videoconference, we heard a similar line of logic being articulated: that (b) (6), (b) (7)(C) actions would be viewed by Wal-Mart's employee's as coercive. Respectfully, this theory of alignment fails as a matter of law. There is no case, Supreme Court or Board, where an individual who did not stand in direct economic relationship with the Charged Party was found to be an "employee." Here, particularly, (b) (6), (b) (7)(C) status is not by any means clear, and to extrapolate an effect *on a separate workforce* none of whom were even present or otherwise directly involved in the events of this case is simply too much of a stretch of the existing precedent.

any form of compensation from the employer, they were seeking entry to wage-paying jobs and the discrimination against them had an adverse impact on those who were already wage earners." 328 NLRB at 1274.

- The Board relied further on *Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971) where the Court held retirees were not employees under the Act. In summarizing the conclusion, the Board stated "Stressing that the Act is concerned with remedying the inequality of bargaining power between employer and employee, this concern did not extend to individuals who had left the work force and no longer worked for an employer." 328 NLRB at 1274
- The Board in *WBAI* concluded: "Applying the teaching of the Court to the case before us on review, we find that these unpaid staff are not employees within the meaning of Section 2(3) because there is no economic aspect to their relationship with the Employer, either actual or anticipated." *Id.*
- (b) (6), (b) (7)(C) never had an actual or anticipated economic relationship with the Charged Parties in this case; it cannot even be fairly said that (b) (6), (b) (7)(C) ever had any direct connection to the Charged parties. (b) (6), was not an employee, (b) (6), was not an applicant, and when (b) (6) was employed it was not at an employer that was directly involved in the events of this case. In other words, any connection (b) (6) actually had was so remote as to be inconsequential for purposes of the Act.

The takeaway from the Supreme Court precedent and *WBAI* is clear. There must exist a direct economic connection between the individual and the Charged Party in order for that person to be deemed an "employee." The cases cited by the agency to us all meet the test as demonstrated by the direct economic control the employers had over the individuals. The test fits within the purposes of the Act by applying commonsense principles. In order for an employer to have taken action that could implicate the Act (conduct which could interfere with, restrain or coerce an employee), it must have some real ability to cause such an effect on the employee. None exists in this case. To come to a different conclusion would be to substitute personal judgment in place of objective proof of an employment relationship. As there is no way to establish (b) (6), (b) [redacted] was a statutory employee under existing precedent, the charges should be dismissed, absent withdrawal.

II. (b) (6), (b) (7)(C) Conduct Could In No Way Be Construed As Coercive

Assuming it could be established that (b) (6), (b) (7)(C) was a statutory employee (which cannot be established), the events of this case show no violation occurred. We briefly touched on the subject of the interview during the videoconference. The circumstances of the entire five minute event are exceedingly benign. Unlike all the cases cited by the agency, the context of the (b) (6), (b) (6), (b) (7)(C) actions demonstrate that the Act could not have been violated. First, the actions did not take pace in the context of a pattern of unfair labor practices. Indeed, other than allegations "surveillance" and "interrogation" arising from (b) (6), (b) (7)(C) actions, there are no other